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A

TREATISE

ON THE

GAME LAWS,

AND ON

FISHERIES;

WITH AN

APPENDIX,

CONTAINING

ALL THE STATUTES AND CASES ON THE SUBJECT.

IN TWO VOLUMES.

VOL. II.

By J. CHITTY, Esq.
OF THE MIDDLE TEMPLE.

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APPENDIX

OF

CASES.

Rol. Ab. Title Grants, 46, *pl.* 20. 21 *Edward* 1. A. D. 1293.

If the king grant a warren to one and his heirs in his manor, the grantee may grant the manor with the warren to another in fee, for it is a liberty which is inherent in the soil and follows the interest in the soil, 21 *E.* 1. Libro Parliament, 47 *b.* agrees.

Bro. Ab. Title Quo Warranto, pl. 6.

In Quo Warranto the defendant claims assize of bread and venison, and he says that it was appendant to the manor from time immemorial, and claims by feoffment of the manor with the appurtenances, and it was held that he may vouch, because the franchise passes with the manor, and it was also admitted that he may prescribe. (*Item Canc.* 6 *Ed.* 2. *fol.* 7.) And it was agreed that a franchise may be appendant to a manor, and may pass by feoffment thereof with the appurtenances. It is otherwise of a franchise in gross, which he has by

A. D. 1293. grant, for he cannot grant this over. And that if a man have warren in his own land, and by grant of the king, and grants a feoffment of the land, and takes back an estate in fee, the warren is extinguished.

Bro. Ab. Title Action sur le Statute, pl. 48.

In an action upon the statute it was agreed that a man may enclose his own land, but he may not make a park in it for feeding wild beasts, without a licence from the king, for if he does, it shall be seized into the hands of the king by the court. And a park may be appendant to a manor.—*Temp. Edw.* 2.

A. D. 1322. *Year Book*, 15 *Ed.* 2. *p.* 443. *A. D.* 1322.

Note.—That where a warren becomes a warren not by a grant from the king, the purchaser shall hold it as a warren in the same manner as his feoffor did. But where a warren is purchased of the king and is afterwards aliened, the subsequent purchaser cannot hold it as a warren without fresh purchase from the king—per Berewyke.

Year Book, 15 *Edw.* 2. *p.* 453. *A. D.* 1322.

A statute, giving the king an action after the expiration of a year, if the party aggrieved fails to sue within that time, does not deprive the party of his remedy at common law.

A man brought his writ of trespass; for that another had fished in his fish-ponds against the peace, &c.—*Fast.* This action is given to the king, after the lapse of one year, unless the owners of the fish-ponds prefer their complaint within the year; and here they have declared upon a trespass committed two years before the purchase of the writ, for which reason we do not think the action can be supported.—*Stonore.* The statute gives an action to the king after the first year, and to the party aggrieved, if he sue within the year. But nevertheless the statute does not deprive them of the remedy by action, which they had before by the common law; and at last the defendant was forced to answer, and he pleaded not guilty, upon which issue was joined.

Year Book, 17 *Ed.* 2. *p.* 538. *A. D.* 1323. A. D. 1323.

The king brought his writ of Quo Warranto, in the island of Guernsey, against one Symond Chein, to know by what right he claimed to have a warren in his own lands.—*Cant:* We claim by charter of King Edward, father to the present king; and he produced the charter, by which it appeared that Edward granted this franchise while he was only prince. *Devom:* now prayed judgment if they could maintain their claim, inasmuch as the charter which they produced for that purpose proved that Edward was only prince at the time of the grant, who therefore could not make a valid grant.—*Tryvaignon:* At that time he was lord of that island, and his father had granted the whole of it to him and his heirs for ever, and thus he had as high an estate therein then, as he afterwards had when he was crowned king.—*Scrop:* The defendant claims under a grant from the lord of those islands, who held the estate of the king therein by right of purchase, in the same way as the Earl of Chester and the Bishop of Durham. It therefore appeared that his estate was good enough upon such title; he afterwards asked the parties if they had any more to say, and they answered—no; wherefore he adjourned till the octave of St. Michael.

The Lord of the island of Guernsey appointed by the king, has full power to grant a free warren therein.

Year Book, 17 *Ed.* 2. *p.* 538. *A. D.* 1323.

The king brought his writ of Quo Warranto against one A. in the island of Guernsey, to know by what right he claimed the privilege of holding his tenantry court independent of every other court? And also, in what right he claimed a free chase in his own lands and elsewhere, out of the royal and other warrens.—*Ald:* By the common law every free man ought to hold a court of his own tenants, and hunt in his own land, wherefore we do not consider ourselves bound to claim a privilege which the common law has given us, and does not lie

Quo Warranto. Keilw. Rep. 138. S. C. *Vide* also Moore, 474. Cro. Jac. 260. Bro. Ab. title Quo Warranto, 4.

A. D. 1393. in franchise, and we pray that of that we may be discharged.—*Scrop.* We would advise further concerning your right to hold your tenantry-court if this writ depended upon that point; but you must answer as to the free chase, for here is Sir Henry Scrop, who witnesses that the usage and custom on the island are such, that no man ought to have a chase in his own land, nor any where else throughout the island, in the same way as in a royal forest, for which reason you ought to answer to that point if you deny the usage.—*Cant:* We claim this right as an appendage to a certain manor, of which one T. was seised, and he and his ancestors from time immemorial have used this franchise as an appendage, until it came into the hands of King Henry, who granted this same manor, with all its appurtenances, without any exception to William our ancestor; and William our ancestor and we have exercised this franchise ever since that grant, upon which we found our claim, &c.—*Devom:* demanded judgment, forasmuch as they had acknowledged that the manor had been in the seisin of King Henry within the memory of man, at which time there was an interruption of the appendant, and the franchise reverted to the crown, which could not, without a special grant, be again separated from it. Judgment.—*Scrop to Devom.* We wished to know from you if this franchise was an appendant before the seisin of the king, or not?—*Devom.* We are not advised upon this point.—And upon this they had a day given them for advice.

Bro. Ab. Title Incidents and Appendants. Pl. 39. Year Book, 3 Ed. 3. S. C.

Park. A man may prescribe that he and all those whose estate he hath in the manor of D. have had park there from time immemorial appendant, &c. and this is good.

Year Book, 4 *Ed.* 3. *p.* 48. *A. D.* 1331. A. D. 1331.

Trespass.

Three men bring a writ of trespass against one A., from which it appears, that whereas the aforesaid B. C. and D. had a free fishery in the water of T., in a certain place called G., and there had made a weir of timber, stones, and planks, for the purpose of confining there salmon and other fish. A. had with force and arms broken this wier, and there destroyed the timber, stones, and planks, to the damage, &c.—*Scot.* Sir, You must consider that the supposition that they have a free fishery in the water, in the manner that they have complained, involves in it the admission that the soil belongs to another: whereas by law they cannot recover damages for the injuring of timber in another's land, and thus their writ contains a contradiction in it, and he prayed judgment of the writ, &c.—*Schard.* We have not supposed that we have a common of fishery, but a general fishery, which a man may have upon his own soil, and general pasturage also.—*Scot.* Whether it be general or common, you assume to take this advantage therefrom, as if it were in another's land; for, if you meant to complain of a trespass committed on your own soil, you should have said—*in solo suo apud* T. And, moreover, if it had been your own land you might have had your assize.—*Wilby.* Although he might have had his assize, this would not deprive him of the power of bringing an action of trespass. And the writ is good enough without mentioning in whose soil, for of that you may take advantage by way of answer.—*Stoner.* The writ is good, wherefore you must answer.—*Scot.* The soil in which, &c. is our soil and our free fishery; and we pray judgment, whether, notwithstanding the ouster was on our own land, they can have an action against us?—*Stoner.* If he had a free fishery on your soil, he might make an enclosure to confine the fish.—*Schard.* Acknowledge the breaking of the enclosures, and then

A. D. 1331. avow the cause, otherwise they do not answer.—*Scot.* *Stoner.* Advise well upon your reply.—*Scot.* Sir, we protest that we do not acknowledge that they have a free fishery in the water in which, &c.; but we declare to you that it is our soil and our free fishery, and that they came and there made enclosure, and claimed the fishery; we ousted them from thence, as we lawfully might, and we pray judgment if they can maintain their action, &c.?—*Ads.* You broke our enclosure in our fishery, and pulled up the timber, as we have complained against you, without this that, &c. Upon which the others took issue.

Year Book, 5 *Edward 3. p. 62. A. D.* 1332.

A. D. 1332. Trespass. Lawrence Preston brought his writ of trespass against W. and one J. The sheriff returned, that John was dead; upon which Schard declared against William (without noticing J.) that he had wrongfully come with force and arms, and broken and entered his park of C. and had taken and carried away certain wild beasts, to wit, deer, of the value of 33 marks.—*Schard* prayed judgment of the count, because he had mentioned the value, whereas a man cannot put any price upon wild animals; he therefore prayed judgment of the count.—*Stoner.* Although he ought not to have inserted the price, yet the count is not therefore abateable; and *Schard* passed over that point, and demanded judgment of the writ, because the writ said *parcum seeum fregerunt et asportaverunt*, when it ought to have been *feras suas*, or *feras inde ceperunt*.—*Stoner.* The writ cannot be otherwise intended.—*Schard.* Writs ought not to be supported by intendment, but by express words, &c.

Year Book, 10 *Edw. 3. p. 20. A. D.* 1337.

A. D. 1337. Trespass. The Archbishop of York brought his writ of trespass against B., which charged him with having entered the free chase of the said Archbishop at B. and there

hunted against his will, &c. and took and carried away his stags.—*Ash.* All the wood concerning which this complaint is preferred is a common chase for all beasts of the chase, and open to every one; and we therefore hunted there as we lawfully might, without this, that the archbishop has a free chase there.—*Hill.* You ought to have traversed our allegation, namely, that you did not hunt in the free chase of the archbishop.—*Poer.* That would have been an admission of your right of free chase.—*Ston.* That would not have been so. For if I avow for damage fesant in my severalty, it is no issue for you to say, that it is not my severalty, &c. A. D. 1337.

Bro. Ab. Tit. C. Incidents and Appendants, pl. 11.

Note, that a forest was appendant to the honour of Pickering, and the king gives the honour, *cum pertinentibus;* by this the forest passes, *(per curiam)* which observe, and yet where the king has granted the wardship of the forest before to J. N. in fee, for a certain rent, this wardship does not pass, for it is severed by this grant, and therefore is not appendant. 26 Edward 3. Case 26, 60. S. C. Forest appendant to an honour.

Year Book, 38 Ed. 3. p 10. *A. D.* 1365. A. D. 1365.

A writ of trespass was brought by one W. K. against one R. of C.; for that he wrongfully entered the warren of the said W. K. and seized, took, and carried away his hares, rabbits, and pheasants. And he declared for a certain quantity of things, without inserting their value. *Belknap* for the defendant, and said, That as to all of the charge, except the taking of one pheasant, he was not guilty; and as to that pheasant we found it in our own land without the warren, and we let fly our falcon at it, which pursued it into the warren, and there caught it, and we followed after and took it up. And he prayed judgment if this was any tort.—*Kir.* Since the defendant has acknowledged the entering into our warren, Trespass. Br. Ab. Trespass, pl. 111. S. C.

A. D. 1365. and the carrying away the pheasant, we pray judgment and our damages. And as to the remainder of the charge we are ready to verify our writ.—*Knic.* As soon as the pheasant rose without the warren, your falcon pursued it into the warren; yet your entry and asportation was tortious; but inasmuch as issue is joined between them upon the remainder of the charge, we cannot give judgment until the inquest shall have been taken on the remainder.

Cases in Eyre, Temp. Ed. 3.—Keilwey, 148 *b.*

Default. Quo Warranto was sued out against a person, to shew how he claimed a warren in his manor of T. and the defendant claimed it as appendant to the said manor.

Cro. Eliz. 547. *Ald.* You have no demesne lands in the said manor, and the other *contra.*— *Hdenh.* One John de L. had claimed the same warren as appendant to the said manor, and made default; wherefore we pray that the warren may be seized by the king.—*Clover.* There is no reason that our franchise should be seized for another's default.—*Scrope* gave judgment that the franchise should be seized; but that the judgment should not be executed until the inquest was passed. *Quod nota, &c.*

Cases in Eyre, Temp. Ed. 3.—Keilwey's Rep. 149. *b.*

Warren. In Quo Warranto it was found, that a man had a warren and that he had no warrener; and it was found, moreover, that no one hunted there in his time, for which his warren was granted to him.—*Scrope* said, That a person had no occasion for a warrener solely to take care of his warren, but that his warrener or any other of his servants might assist one another.

Not essential to the existence of a warren, that a warrener be appointed.

Keilwey's Rep. 150. a. Warren. In Quo Warranto the defendant claimed a warren, and it was found that he had misused his warren, and moreover, that the soil belonged to a stranger,

and he not opposing it, the warren was seized by judgment, &c. A. D. 1365. Bro. Tit. Warren, 2.

Cases in Eyre, Temp. Ed. 3. Keilwey's Rep. 151, *b.*

A person shews that he has a warren by the charter of King Henry, great-grandfather of the present king.—*Ald.* Take good care how you avow this charter, for the said King Henry was imprisoned, and was compelled to make many charters, and therefore it is that there is a warren at present, &c. Royal Charter during the king's imprisonment.

Year Book, 40. *Ed.* 3. *p.* 45. *A. D.* 1367. A. D. 1367.

Pr. Kirton, Serjt. arguendo, neither a fishery or common are ancient demesne as the soil is, for nothing is ancient demesne but that which may be held.—Mich. 40. Edw. 3. p. 45, c. 30. A fishery not be ancient demesne because it cannot be holden.

Year Book. 42 *Ed.* 3. *p.* 2. *A. D.* 1369. A. D. 1369.

Trespass was brought against one because he was supposed to have taken wild beasts and conies in plaintiffs free chase, &c.—*Clelr.* We say that what he calls his free chase was forest in the hand of the king, father of our present king; therefore we pray judgment if plaintiff shall be received to say that it is his free-chase without shewing how.—*Fencot.* And because you have made no answer to us, we pray judgment, &c.—*Kirton,* if this was forest in the hand of the king, it could not be your free chase, unless you had a subsequent grant from the king, therefore you must shew how it became your chase. The defendant however, was obliged to plead over, and then he says that plaintiff gave him leave to hunt in the said chase, and that he hunted with another person who also had leave.—*Fencot.* What grant have you?—*Kirton.* We will prove it.—*Fencot.* Because you have pleaded a matter which lies in grant, without shewing what grant; we pray judgment and our damages; however he was compelled to reply, and then he said that In a declaration in trespass for hunting in a free chase it is not necessary for plaintiff to shew how he is entitled. Defendant may plead license to hunt without shewing in his plea how he obtained it.

A. D. 1369 defendant hunted of his own wrong and without such cause, and this he was ready, &c. *Et alu è contra.*

Year Book, 42 E. 3. p. 3. A. D. 1369.

Grant of warren to a lord of a manor will not pass by his subsequent conveyance of the manor.

Pr. Wichingham, J. If the king grant a warren to one, who is tenant of the manor, he shall have warren through the whole manor, and if he alien the manor, the warren passes not by the grant, because it is not appendant to the manor.

Year Book. Hil. 43 Ed. 3. p. 8. A. D. 1370.

A. D. 1370.

Husband entitled to a chase in right of his wife may sue alone, for a trespass. Trespass dont lie for entering a chase unless it be also stated that game was killed, &c. Beasts which escape from a chase into sown land may be hunted back with little dogs. Bro. Ab. Forest, Park and Chase. Pl. 1. S. C.

Lord Arundel brought a writ of trespass, and supposed by it that he was lord of B. and many other vills, through which vills he had a free chase, the defendant had entered his chase and hunted his wild beasts, (to wit, stags, bucks, does,) and had killed and taken them away.—*Kirton.* The earl hath nothing unless he be joined with his wife, and named with her, &c. therefore we pray judgment of the writ, &c.—*Belknap.* It is a writ of trespass, and issues for a trespass done to the husband and his wife, and is in the personality; on which account for default of answer we pray our damages.—*Kirton.* He claims the chase on account of his seigniory, which seigniory is in the realty, therefore his wife should be named.—*Finchden, J.* I put this instance: if he had brought a writ of trespass, and had supposed in it that he was lord of a vill, in which he ought to have estrays, and another had taken them, would it be a good plea to say, that he had nothing in the seigniory unless joined with his wife?—*Kirton.* Yes, sir, that is the case we are now debating.—*Belknap.* No, sir, for that is a chattel vested in the husband, and if he release it the wife shall have no action after his death.—*Kirton.* This is the strongest reason against you, for if the husband had not released it, the wife should have an action after his death, and this clearly proves it not to be a chattel vested in the person of the husband alone.—*Belknap.*

A man cannot have a writ of trespass because one entered into his chase, unless there be more in the writ, that is to say, unless it appear that he took and carried away his beasts; whence it clearly appears, that the mere entry into the chase will not maintain the writ, but the carrying away only, which is entirely in the personality; and the cause of action arises from the thing being in the personality, therefore there is no occasion for the wife to be named.—*Mombray, J.* In a writ of ejectment of wardship, where a man has nothing in the freehold unless joined with his wife, in that case the wife must be joined in the writ.—*Kirton.* In a writ of trespass for cutting down and t king away trees, if the husband hath nothing in the freehold unless joined with his wife, she must be named in the writ or it will abate; so it is here; and in that case the writ was held good by all the justices.—*Kirton.* We say that he had a vill in the same county called Pleighton, and forty acres of land enclosed within a hedge, which land adjoins to D. where is the supposed chase; this vill of P. is held of the defendant, and not of the earl; these forty acres of land adjoining to the chase which he supposed himself to have in B. were sowed with corn; these beasts come from the chase in D. and depasture and tread down the corn, and the defendant with his little dogs chased them out of the corn, and the little dogs pursued them as far as D. in the chase, and the defendant still being in these forty acres, which were his own demesne lands, called back the dogs before they entered into the chase of D. and the dogs stopped without hunting in any other manor in his chase, and without this that he took any of the beasts; therefore we pray judgment if there be any lost, &c.—*Belknap.* It is no plea unless you deny having killed them.—*Kirton.* We know not whether they killed any or not, therefore we will not say it, for though the dogs may have killed some of the A D. 1370.

A. D. 1370. beasts, there is no reason that we should pay damages, for we did all in our power by calling them back before they entered the chase.—*Belknap.* Acknowledge then that they killed the beasts, and await judgment.—*Kirton.* No, sir. I think that it was competent to the defendant to chase the beasts out of his corn by little dogs, but not with hounds; therefore, though the little dogs did pursue them into the chase, the defendant having called them back, did all that was in his power and ought not to pay damages.—*Thirkden, J.* You must either shew and acknowledge the trespass, and wait judgment, or you must deny it; consider of it. And then he adjourned the question till another day.—*Kirton* repeated his plea, *ut supra*, and said in conclusion, without this that he killed or took away any of the beasts, and this he was ready, &c. *Belknap* had it in the writ that he had killed, taken, and carried away of his own wrong as he had counted against him, and this he was ready, &c. *Et alii e contra et alii aprentici fuer' en opinion que nusq.*—*Kirton* acknowledged that the dogs had killed the beasts in the chase, in the pursuit that they had made, but the defendant was not chargeable for this; and it was said by some that if wild beasts come into a persons land that lies fresh, there being no grass on it, the landholder cannot chase them away, &c. *Ideo quære quia falsum ut credo*, &c.

Year Book, 43 *Ed. 3. p.* 13. *A. D.* 1370.

A writ in trespass for entering a warren and taking hares, &c. omitting "there" is good. A person may have warren in another's freehold.

Hugh de Baringham brought a writ of trespass against one J. for that he entered into his warren at B. and hunted hares, conies, peasants, and partridges, and took and carried them away.—*Belknap.* We pray judgment of this writ, in that he hath not supposed in it in what place defendant took these conies and pheasants.—*Kirton.* He has supposed that he entered into his warren at B. and from this place it must be intended

that the carrying away was, therefore the writ is good. A. D. 1370.
—*Belknap*. The writ should have been "*in eodem, &c. cuniculos, &c. cepit et asportavit;*" as in a writ of trespass for goods carried away, it must be said "*ibi cepit et asportavit;* wherefore, &c. and the writ was adjudged good.—*Belknap*. As to what relates to the hares, pheasants, and partridges, defendant is not at all guilty, and as to the six conies, we say that J. has in the same vill six acres of fresh land, of which land J. and his ancestors have been seised from time whereof, &c. and have held it in freehold, in which land he took the conies, as he well might in his own demesne land, and we pray judgment if for this an action will lie, &c.—*Kirton*. We say that Hugh is lord of the vill of B. and these six acres of land are held of him and H. and his ancestors have had warren in these six acres, and in all the remainder of the vill, from time, &c.; wherefore, since defendant hath confessed the taking, we pray judgment and our damages; and we wish too to aver, that he hath hunted in other parts of the said warren, and this we are ready, &c.—*Belknap*. And we pray judgment because these are beasts which burrow in the earth, and you have not denied this to be our freehold, and has been in the hands of the said J. and his ancestors, from time, &c. and he doth not alledge that he hath recovered any warren in these six acres of land, nor that there ever was any disturbance, and though a man may have warren, yet it should be in his own demesne land; wherefore we pray judgment, &c.—*Kirton*. And we pray judgment because we are lord of the said vill of B. and this land is held of us, and we have had warren in this land as in other land through the whole of the vill of B. from time, &c.; and he hath in part acknowledged the taking; wherefore we pray judgment; and we wish to aver too, that he hath hunted in other parts of our warren of A. and this we are ready, &c.—*Belknap*. If

A D. 1370. you have warren in our freehold, you disturb us in the profits of our land, which would be unreasonable, for conies are beasts of such a nature as to burrow in the land, and if this burrowing were allowed, they might do it through the whole land, and then a man would never have any profit of his land; wherefore, &c.—*Kirton.* So it may be said of partridges and pheasants, for they scratch up the soil.—*Finchden, J. to Kirton.* Surely as well in the one case as in the other.—*Finchden, J.* What say you to the allegation of Kirton, that J. took conies elsewhere in his manor of B.—*Belknap.* This is no plea, unless he now specify where and in what part of the manor of B. or otherwise declare that he hath taken them in his demesne lands in the vill of B. for he cannot have warren except in his demesne lands.—*Finchden, J.* This is no part of his duty, for you must excuse yourself from the tort he hath supposed against you, for it is sufficient for him always to maintain his writ, therefore you must answer.—*Belknap.* We say that E. had a freehold in B. to wit, six acres of land, and W. other six acres, in which land J. took conies by the assent of E. and W. therefore we pray judgement if we have done any wrong, without this that we took or hunted elsewhere in the warren, and this we are ready, &c.—*Kirton.* J. hath hunted elsewhere in our warren of B. and this we are ready, &c. *Et alii è contra, &c.*

Year Book, 43 Ed. 3. p. 30. A. D. 1370.

If a park be seized by the king for not being inclosed, the owner is again entitled to it, on payment of a fine.

Trespass for breaking a park.—*Belknap.* We say that the park is in the forest of D, and the law of that forest is this, that if any one has a park not enclosed, and this be presented before the justices of the forest, then the park shall be seized into the hands of the king, &c. We say too, that it was presented before the justices, that this park was not enclosed, on which account the justices commanded the defendant to seize the park

into the king's hands; and on this command he did enter, and seize it into the king's hand, and in entering, he broke the park in the place where he entered, and we pray judgment if plaintiff can support this action.—*Kirton.* And we pray judgment, because you have not denied that although this was plaintiff's park before the seizure, and that it was seized into the king's hands, yet this seizure gives no title to the king, but only to have his fine for the said trespass, and we say that we have paid our fine to the king for the said trespass, and recovered our park out of the king's hands, and the defendant hath acknowledged the trespass, therefore, if he is not now punished, he will remain unpunished at all, wherefore, &c.—*Belk.* If he should now be punished for this cause by this writ, he may be punished again by a writ from the king, so that he would be twice punished, which would be inconvenient; it is reasonable then that this writ should abate; because for the trespass done to the king he would still be liable; wherefore, &c.—*Kirton.* If the king leases a ward, and the lessee commit waste, and the king will not punish the waste, he that is in ward shall recover against his guardian when he shall come of age, and have his land out of his hands; and so here, because the king does not choose to punish the trespass, and the land is come out of the king's hands by payment of the fine, it appears this action may be maintained, *et adjournantur.* A. D. 1370.

Year Book, Easter, 44 Ed. 3. p. 12. A. D. 1371. A. D. 1371.

Trespass because defendant had hunted in plaintiff's warren.—*Belknap.* Of the land in which this supposed hunting took place, we are seised in our demesne as of fee by descent of inheritance, at the time of the supposed hunting, and still are so, where we hunt, as it is lawful for us to do, without this that we have hunted on plaintiff's land, and this we are ready, &c.—*Kirton.* Because

Br. Ab. Warren, pl. 4. S. C.

To trespass for hunting in a warren liberum tenementum is a good plea, and plaintiff

A. D. 1370. must reply his title to the warren.

he hath not traversed that we have warren there, (as we may have warren in other land besides our own demesne,) we pray judgment and our damages.—*Finchden, J.* He has answered you to all common intent, for if you have warren of the grant of the king, his answer is sufficient, for the grant of the king of warren may be *in dominicis terris*; and he hath answered well to this too, for if you have warren by prescription, as well in other lands as in your own demesnes, this should be alledged; *to which the whole Court agreed;* wherefore, &c.—*Kirton* made protestation that he had warren as well in other lands as in his own demesnes, and said that he hunted in his warren in his own demesne, and this he was ready, &c. *Et alii è contra.*

A. D. 1372.

Year Book, Easter, 15 *Ed.* 3. *p.* 7. *A. D.* 1372.

In trespass, where the defendant pleads that he imprisoned the plaintiff under a presentment at the swainmote, de son tort demesne is a good replication. Bro. Ab. de son tort demesne, pl. 7. S. C.

A writ of trespass was brought against one J. of W. because he came to a certain place and imprisoned the plaintiff.—*Bellnap. J.* says, That he is forester in fee of the forest of B. and that at a certain swainmote it was presented by the foresters, verderers, regardours, and agistours, and that the said plaintiff had taken deer hunted in the forest; wherefore the said defendant came to the plaintiff, and desired him to find pledges to answer before the justice in eyre in that place, &c. But he refused to do this, therefore he kept him till he performed the statute, &c.; and he demands judgment if he hath done any wrong: and plaintiff said he did it of his own wrong, and without such cause, &c. And this issue was received by the court; and it was said, that before the justices in eyre he should not be allowed to aver contrary to the presentment of the foresters, &c.

A. D. 1373.

Year Book, 46 *Ed.* 3. *p.* 11. *A. D.* 1373.

Trespass was brought because defendant fished in plaintiff's free fishery in a certain place.—*Bellnap.*

There where he supposes that we fished, &c. in a certain place, we say that the place where he supposes the trespass to be done is a great water called Bakleswater, which was the freehold of T. his master, and he went there by his command, &c.; without this that we fished in his free fishery elsewhere; and without this that he had any thing to do there, &c.—*Fenk.* We pray judgment, for we have brought our writ in a certain vill, &c. through which we suppose that he fished, &c.; and this you deny not, therefore we pray judgment, for though you have answered as to this place, yet it may be that you have fished in our free fishery elsewhere in the same vill. And then *Belknap* said, that his master had let him the said fishery to farm by the year; without this that he had free fishery in that place; and without this that he fished elsewhere in the same vill.—*Fenk.* The said place is our free fishery, and this we are ready, &c.—*Belknap.* We pray aid of him to whom the soil belongs.—*Fenk.* You cannot have it.—*Finchden, J.* Ask him the reason why he cannot have it.—*Fenk.* Because he has the said soil in farm.—*Finchden, J.* This cannot be the reason, for observe where avowry was made of a rent issuing out of the land of the wife, plaintiff had aid of the wife, yet the freehold is in the husband; but he had other cause there. *Quære, &c.* A. D. 1373.

Year Book, 46 *Ed.* 3. *p.* 28. *A. D.* 1373.

Trespass by the Prior of Huntingdon against the burgesses of a town, where the prior supposed by his writ, that he and all his predecessors had been seised of a manor called Herford, to which the water of Ose, within certain bounds, is appurtenant; and he and his predecessors have had and used their fishery there, and this by the grant of King John; and produced his charter, and that the said burgesses had fished and taken fish of their own wrong, &c.; upon which the burgesses had

In a declaration for trespass to a fishery it is not necessary to shew title.

A. D. 1373. aid of the king as farmers of the town of which the water is parcel; and after the writ came to a procedendum, and divers challenges were made to this by *Persay*, *et non allocatur*, &c. And then *Persay* said, that the said water is adjoining to the said town, and there are divers boats daily carrying victuals to other places, from which the burgesses have taken custom as belonging to the said town, which is their farm; and said that they at all times had used the fishery as parcel, &c. and they demand judgment, without this that the said prior and his predecessors have had and used it as their fishery.—*Belk:* rehearsed that which *Persay* had said: and moreover, that the prior had there a water within certain bounds, for he had named his fishery, of which water his plaint is, without acknowledging that they had had and used to take custom of the said water; and said, that he had a several fishery in the same water at all times: without this that the said burgesses had such fishery from time, &c.—*Persay*. Those that belong to the town have had a fishery, without this that you have a several fishery from time, &c.—*Belknap*. You must not have so comprehensive an issue against us, for it is enough for us to maintain that the water is our several fishery.—*Finchden, J.* You may not have issue against the prior in this manner, for if the water is his, and you do not deny that he had the water, where of common right a man shall have fishery in his own soil, so that it belongs not for him to make title, but for you who claim the soil.—*Janke*. In case a man claims to have estray from time, &c. it is a good answer for plaintiff to aver, that he took the beasts of his own wrong, without this, that he had title from time, &c.; and this, that he had the estrays.—*Finchden, J.* That is not surprising, for a man shall not have estray of common right but by prescription, and so make title in this manner.—*Persay*. He hath made a title in his writ, by traversing which he holds us to prove this in

the issue.—*Finchden, J.* But he has more in his writ than he ought to have, and the issue must be taken according to law, and he must maintain his several fishery as a gift to him of common right, without alledging continuance of time, whereof memory runs not, &c. *Et ita fuit.* A. D. 1373.

Year Book, 47 *Ed.* 3. *p.* 10. *A. D.* 1374. A. D. 1374.

A man before this time brought a writ of trespass against two, and supposed that they had hunted in his park in a certain place, who afterwards pleaded not guilty. And it was found by the inquest that one came alone at a certain day, and hunted in the said park, and took certain deer to the damage of plaintiff of thirty shillings, and that the other came at another time by himself, and took a deer as he was riding through the park, through which there was then a high road, to the damage of plaintiff of two marks.—*Haman* prayed double damages, and that they should be imprisoned three years according to the statute.—*Finchden, J.* This action is given by the common law; and though the statute gives, that a man recover great damages if he sue upon the statute, yet this ousts not a man of his right of suing out a writ at common law, if he wish it, and by the common law a man shall have no greater damages than the quantity of the trespass, so that it seems by this writ you can have no double damages; but if you wish to have benefit of the statute, you must make mention of it, but you can by no means have your prayer upon this general writ. And then it was awarded that the plaintiff do recover damages against one to thirty shillings; and that plaintiff be amerced, for that defendant was acquitted of the trespass done in common with the other, as he had supposed; and also that he received the two marks from the other, and that he be amerced towards him *ut supra*,

In order to recover double damages, under statute de Malefactoribus in Parcis, the declaration must be contra formam statuti.

Bro. Ab. title Actions on Statute, pl. 10. and title Trespass, pl. 158.

A. D. 1374. because he was acquitted of part. *Et sic vide* that he was amerced towards the two separately, by which, &c.

Year Book, 47 *Ed. 3. p.* 22. *A. D.* 1374.

Trespass lies by one tenant in common against the other, for destroying old doves in a dove-cote.

In a writ of trespass, wherefore with force and arms he broke the dove-cote of plaintiff, and killed two hundred doves, of the value of forty shillings, by which he wholly lost his flight of doves, and other wrongs.—*Hasty* said, that the place where the dove-cote was assigned, was held of the manor of S. which is antient demesne of the king, and he prayed judgment if the court would take notice of it. *Et non allocatur.* Then he said that one T. Smith was seised of a messuage, in which the dove-cote is assigned, in his demesne as of fee; and he died seised; after whose death it descended to his two daughters, one of whom aliened her part to plaintiff, and the husband of the other sister is defendant, and we demand judgment, if an action can be maintained against us who are thus tenants *pro indiviso*.—*Tank.* And we pray judgment since by our writ we have supposed that you have destroyed the whole flight, and an action of waste we cannot have, nor other action; we pray then that you be attached, for if two parceners hold *pro indiviso*, and sow the land, and one reaps the whole, the other shall have an action of trespass, *et hoc conceditur per Finchden, J.* So in this case, where one has a several right, &c. But it would be otherwise with jointenants, *ut dicebatur. Haman.* If two have an ox in common, and one sell the whole and retain the money to himself, he shall not have an action of trespass but a writ of account.—*Finch, J.* It would hold good of one beast as well as of many.—*Jank.* For cutting of wood which is *pro indiviso*, we hold that an action of account has been maintained, and so with regard to ward.—*Finchden, J.* Ward, which is held *pro indiviso*, is in the realty, and not severable, so that though one take the whole, trespass

will not lie but account. But it is not so here, for here he may have an assize, and become plaintiff for a moiety. So with two jointenants if one disseise the other, an assize lies for a moiety, &c. and this action would lie for him as well as an assize, not so in case of ward.—*Tank.* So he might name his companion and claim the whole.—*Finchden, J.* Yes, but there he would be amerced, and judgment would be given for him to hold in severalty in such case, &c. by which, &c.—*Hasty.* Proceed.—The writ is good enough, and our plea is to the action for the moiety, &c.—*Hasty.* As it was before said that one T. Smith was seised of the said tenement, &c. and died seised, after whose death they descended to Is. and Katherine, as to the two daughters of J; Katherine granted what belonged to her to plaintiff, and the other took John Berdwicke the defendant to husband.—*Rob.* Plaintiff broke the door of the dove-cote, and we have and took the young doves, and we pray judgment if we committed any tort, &c.—*Finchden, J.* What say you to the old doves?—*Hasty.* We will imparle, &c. and then said as before, without this, that he took no old doves, and this we are ready, &c. To which it was rejoined, that the freehold was alone in the plaintiff, and this we are ready, &c. *Et alii è contra.* A. D. 1374.

Year Book, 2 Hen. 4. p. 8. A. D. 1401. A. D. 1401.

In a writ for a trespass done at Stokefield, *de riparia sua separali*, &c. and also of divers other trespasses.—*Hill.* You can have no action, for we say that the plaintiff was bound in a statute staple at Cicester to the now defendant, to pay him a certain sum of money at a certain day, which is now come, and that the now defendant has sued out execution, has the lands in which the fishery is supposed to be in execution, &c. and he has fished there as is lawful for him to do, &c. therefore we pray judgment, &c.—*Skrene.* To this we answer, that

A fishery may be extended under a statute staple.

A. D. 1401. the lands were not in the hand of the plaintiff at the time of the extent made; and also that the river was not extended; for nothing can be extended but the land and the wood, as appears by the extent, therefore we pray our damages.—*Hill.* And we pray judgment, because you deny not the acknowledgment of the staple made by you, nor that the lands were in the hands of plaintiff, at the day of acknowledgment, and ever since, &c. And as to what you say about the day of the extent, no law commands us to answer to what you alledge about the river not being extended, since you do not deny that the land was extended, and livery in fact made to us; we pray then that you may be barred, *et sic ad judicium.*—*Skrene.* According to the method of this plea, when a writ issues to extend the lands of any one by force of a statute, it gives no other warrant but only to extend the lands of the person who entered into the recognizance, but makes no mention of the lands which he had at the day of the recognizance made, or at any time since, but only of the lands which he had at the day of the extent; and then, when the sheriff hath returned that he hath no land, another writ shall issue to extend the lands which he had at the day of the recognizance, or at any time since; *quod quære.*—*Hankford.* If water runs through my land, of which livery has really been given, shall not this pass in execution?—*Thwit.* I think not unless it were extended.—*Thirning.* If it is of more value afterwards than it was at the time of the extent, as by reason of ward, wreck, or escheat, or other casual profit, you may come in and shew that matter to the court, and have a *scire facias* against him who sued out execution, &c. for by these means he is nearer getting his money, &c. and you shall have livery so much the sooner, &c. And so it is in this case.

Year Book, Hil. 3 Hen. 4. p. 12. *A. D.* 1402. A. D. 1402.

Trespass was brought against one, supposing that he had fished in plaintiff's free fishery in a certain vill, on the day of St. Michael, to which defendant replied, that plaintiff is lord of the said vill, &c. and made one J. his bailiff, who leased the said fishery to the defendant for years, during which term he fished, &c. and he prayed judgment if, &c.—*Tyl.* Sir, you clearly perceive how he supposeth that our bailiff hath leased to him, and hath not pleaded by what warrant the bailiff made this lease, but because he knew this, &c. he prayed judgment, &c. But he dared not demur, but said that he fished since the end of his term; and this he was ready, &c. *Et alii è contra, &c. Vid. M.* 41 *Ed.* 3. *fol.* 26. That a bailiff cannot change the avowry of his master to his disadvantage.

Brooks Abr. Title Warren, pl. 5.

Recorded by *Thirne*. If the king grants a warren to a man and his heirs, without mentioning his assigns, and the tenant aliens the land, the assignee shall have warren; nevertheless it seems that it must be understood that he aliens the land and grants the warren expressly, for it seems the warren will not pass without express words. Year Book, 14 Hen. 4, 6. S. C.

Year Book, Trin. 5 *Hen.* 5. *page* 1. *A. D.* 1418. A. D. 1418.

A writ of trespass was brought against many, because they had broken plaintiff's park and his wild beasts there, &c. And one of defendants came, against whom plantiff counted, that he with others named in the writ, on such a day and year, &c. broke his park and there hunted, &c. and his wild beasts wilfully killed in their wrong, &c.; to which defendant pleaded not guilty; and the jury came and were charged, and it was said in evidence for plaintiff at the trial, that they ought not to be charged to find whether the trespass was done on the day alledged in the writ or on any other day, and this was held

A. D. 1418. by the whole court; upon which the inquest came and said that defendants entered plaintiff's park to hunt the wild beasts and kill them, but he killed none to the damage of plaintiff of 40*s*. to wit two marks for the trespass and one for the costs, &c.—*Hull* said to the jury, that the damages were too little, for in this case they ought to assess the damages higher because this offence was forbidden by statute; so this trespass was not like a common trespass, &c.—*Strange* prayed judgment against him who was found guilty, and released his action against the rest, &c.—*Hull*, by advice of his companions, awarded that plaintiff should recover against him who was found guilty 40*s*. assessed by the jury, to wit, two marks for the trespass and one for his costs, and besides this 40*s*. taxed by the court for his costs; and that defendant be taken and imprisoned for three years, and that he make fine to the king; and that at the end of three years he shall find sufficient sureties that he do so no more, and that if he cannot find sureties he abjure the realm.

Quære.—Since the plaintiff had released the action against the others what should be done?

A. D. 1425. *Bishop of Canterbury and others v. Osebert and others*, 3. *Hen.* 6. *A. D.* 1425.

Bro. Ab. Trespass, pl. 10. et Warren, pl. 1. S. C.

An action of trespass was brought by the bishop of Canterbury and others against one Osebert and others. The writ was *quare vi et armis warrenam suam in certa villa intraverunt, &c.*—*Rolf* prayed judgment of the writ, because the soil where the plaintiff claimed his warren was the defendant's freehold, and in that case the defendant could not be said to enter into his own freehold with force and arms, and therefore prayed judgment of the writ.—*Strange.* Notwithstanding any thing the defendant has said we demand judgment whether our writ be not sufficient.—*Cockain.* It appears to me that the writ should abate, for let us suppose that the tenant for a term

of years brings a writ of trespass against his lessor, A. D. 1425.
not as lessor, that he with force and arms entered into his close, &c. the defendant pleads that he let the land in question to him for a term of years which still continues, and I say this matter being shewn abates the writ of *vi et armis*.—*Babington*. It appears to me that the writ is good, *quare vi et armis intraverunt warrenam*, and not *in solum*, for if the writ had been *quari vi et armis in solum*, &c. the writ would have abated, for the soil belongs to the defendant, but the warren to the plaintiff, and therefore a writ of trespass will be maintainable against him who is tenant of the land, *quare*, &c. If I have a common appendant on your land, and I put in my cattle to use the common, and you come and take my beasts, I say that I shall have a good writ of trespass *vi et armis* against you, declaring that you come on my common with force and arms and take my beasts; so in this case.—*Paston* to the same effect. And let us suppose that I have distrained on my real tenant for certain rent in arrear, he makes a rescue from me with force and arms, I shall have for this a writ of rescue with force and arms, and it shall not be pleaded that the place in which &c. was his free tenement, no more in the case at bar. Wherefore, &c.—*Rolf*. Sir, I admit that in such case you will have a good writ of rescue, supposing the rescue was *vi et armis*; but if the writ be *quod intravit vi et armis et rescussum fecit*, the writ might be abated, because (as has been well remarked) one cannot enter upon his own soil with force and arms; and the law is the same in the case at bar as if the writ be *quare vi et armis intraverunt*, &c. it abates. So there is a difference where there is in the writ this word (*intravit*) and where there is not, and such is the case at bar; if this word (*intraverunt*,) had not been in the writ, it might have been sufficient; but, as it is, the writ abates, wherefore, &c.—*Cotton*. to the same effect. And as to what Babington has

A. D. 1425. said, that because not the warren but the soil is the defendants, the writ is good, *vi et armis in warrenam intravit*, sir, as it appears to me; it will be all one whether it be "*quare vi et armis in warrenam intraverunt*," or "*quare vi et armis in solum*," &c. for the warren is upon the land, for by his writ it is alledged that they take certain conies, and that he has warren and conies, and the warren is in effect on the same land, for they burrow and scratch in the land, and so the land is the cause of his warren, in which case it cannot be said that he enters upon his warren with force and arms unless he enter upon the land; wherefore, &c. —*Strange*. We will suppose that one grants me the vesture of his land, and afterwards the grantor comes and reaps the corn and carries it to his own barn; I say that I shall have a good writ of trespass against him for it, and *quare vi et armis*, &c. So here, &c. —*Martin*. This cannot be, for (as has been well observed) one cannot enter into his own freehold with force and arms, and the case at bar and the case of the common are all one. And as it appears to me it will be hard to maintain the writ "*vi et armis*" in either of these two cases, for the common is annexed to the land, and so is the warren. Wherefore the plea which the defendant pleads is good. And let them demur if they please, at their peril.—*Rolfe*. Sir, our claim is in abatement of the whole writ.—*Martin*. It is not so, wherefore, &c.—*Rolfe*. Sir, as to the writ, in as much as it is *vi et armis*, we demand judgment for the above cause *et alli è contra et sic ad judicium*. As to the chasing we pray judgment; and as to the whole chasing in two vills, that is to say in B. and C. not guilty. And this he is ready, &c. And as to any chasing in C. D. action ought not to be maintained. For you have Obson, one of the defendants, who says, that the same land, in which it is alledged that we ought to chase, is held of the earl of Arundel, who is un-

der age, and in the guardianship of the king, and not of full age, which belongs to the same Obson and Robert the lord of Pomnings, and to Richard the lord of Scalis, and he entered and chased, as it was lawful for him to do. And we demand judgment, if, without shewing how he has warren, an action ought to be maintained; and this he pleads for Obson, and as to all the other defendants he pleads the same plea, and shews that they were servants to Obson and to the others. Wherefore they entered by their command and chased and took two conies, &c. Wherefore, &c.—*Strange*. To this we may say that the plaintiffs are seised of the manor of B. in their demesne as of fee, of which manor they and all those whose estate they have, have been seised of the said manor and have had warren appurtenant to the same manor in the same land from time whereof the memory of man is not to the contrary. Which matter we will maintain. Wherefore, in as much as they have acknowledged the chasing, we pray damages.—*Rolf*. For how many do you plead this?—*Strange*. For all, against all.—*Rolf*. To this we say that the plaintiff, and also the duke of Lancaster, whose estate the plaintiffs have in the said manor of B. in which they claim to have chase, have come oftentimes upon the land, in which, &c. have in their own wrong chased there, and sometimes took two leverets, and sometimes three, against the will of the said persons to whom the freehold belongs, and against the will of the persons whose estate they have in the land. Without this, that the plaintiffs, or those whose estate they claim in the manor, have had chase from time whereof the memory, &c. Wherefore, &c. —*Strange*. The plaintiffs and all those whose estate they have, have chased there for time whereof, &c. And this they are ready, &c. *Et alii è contra*. And, Note, that it was said by Martin in his plea, a man will not be allowed to prescribe to have a chase without the word "*in dominicis suis terris*," by which is meant all

A. D. 1425.

A. D. 1425. the lands which are within that his signiory and tenure, and in no other lands, for by the words *in dominicis suis terris* is understood the demesne lands, and no others, without the signiory, and not holden of him, a man will not be permitted to prescribe, for he cannot have a warren unless by grant of the king, or by patent, and not by prescription; they ought to shew, however, that the land in which they claim to have warren has been held of them in their fee and signiory. And for this, quære.

Brook. Ab. Tit. Trespass, pl. 10.

Year Book, 3 Hen. 6, 12. S. C.

Trespass *vi et armis in liberâ warrenâ suâ apud D. intravit* and chased, &c.—*Rolf.* The soil in which, &c. is the defendant's freehold, and therefore he cannot enter into his own soil *vi et armis*—Judgment of the writ.—*Babington.* The writ is for the entry into the warren and not into the soil, and the soil may be the defendant's and the warren the plaintiff's, &c. Wherefore, &c.—*Martin.* says as to the residue that this clearly does not go to the whole writ, wherefore Rolfe pleads to the chasing.

Henry Archbishop of Canterbury v. W. T. and others.
3. Hen. 6. p. 55. pl. 34. A. D. 1425.

F. N. B. 86. M. Bro. Ab. title Propertie pl. 10.—7 Coke 18.

Trespass was brought by Henry Archbishop of Canterbury and others against W. T. and others, for that the defendants, on a certain day, &c. entered into their warren with force and arms in such a place, and there chased and took their hares, &c.—*Rolf* prayed judgment of the writ, for the writ is this, "*Quare, &c. in warrennam suam, &c. intraverunt et mille lepores ceperunt et asportaverunt*, &c." In that case the writ should have been "*lepores suos*," as where in a writ of trespass of certain trees the writ should be *Quare arbores suas vel blada sua*, &c. otherwise the writ abates; so here.—*Babington.* In that case I grant that the writ should be so, viz. "*arbores suas et blada sua*," for the writ does not lye for him except that the true property must be stated expressly in the writ, and this by that

word (*sua*); but it is not so of hares, or other beasts of warren, for the true property of them does not belong to him to whom the warren belongs; for they belong to him by reason of the warren, i. e. while they are within the warren, and if they go out of the warren, it is lawful for any man to take them; and I shall not have an action for this; which clearly proves that the true property of them is not in me who am the lord of the warren, and therefore the writ is good for stating, "*quod ceperunt mille lepores*," without any thing more, and this was the opinion of the whole court. A. D. 1425.

L'Abbe de Dieu v. J. S. and others, 7 Hen. 6. A. D. 1429. A. D. 1429.

The Abbot d'Dieu brings a writ of trespass against J. S. Knight, and J. S. Esq. He alleges in his writ that the defendant "*liberam chaceam suam apud le Beine intraverunt et feras*, &c. *ibidem ceperunt et asportaverunt*." —*Chaunt.* For the defendant, says that the king is seised of the forest of N. in his demesne as of fee; and we say, that there is this custom from time immemorial, that if any wild beast go out of the verge of the forest into any chase or warren adjoining to the said forest, that the foresters of fee of the said forest, or any of them, or their servants, may enter the chase or warren, or other close, and with small dogs chase back the wild beasts of the king into his said forest. And it is said, moreover, that the said defendants are foresters of fee of the said forest, that the wild beasts had entered the chase of the plaintiffs, and the defendants, as foresters (according to the custom) entered and drove the beasts back, and we demand judgment, if the king should not be consulted before further proceedings.—*Newton.* There is a difference between the aid prayer of a common person and the consulting the king in a writ of trespass, for before the defendant has the aid of a common person he shall plead

A. D. 1429. to the issue; but the king shall be consulted before issue. So where a man justifies in right of the king, his justification ought to be good, and in this case he justifies that by force of a custom, for which a custom cannot exist. For he says, that there is a custom that when the king's wild beasts go out of the forest, the foresters shall follow and chase them; and this cannot be, for immediately after they are without the verge of the forest the property is out of the king, for the possessor of land creates the property in such beast; for if a man hunt in my park, I must declare, "*quod parcum fregit et feras ibidem cepit*," &c. but not "*feras meas*," for if they are out of my park "*occupanti conceditur*." So you have declared that the beasts were out of the forest, and inasmuch as the property is out of the king and in us, by reason that they were in our chase, so there cannot be a custom that any one should enter my close and take my beasts, so this is not sufficient cause for having aid. Wherefore, &c.—*Cockain.* If a stag goes out of the forest and the foresters follow him and make proclamation in the next vill, after such proclamation it is not lawful for any one to take him.—*Babington.* But whether such a custom can exist, or not, the defendants cannot try this issue without the aid of the king, in whose right, &c. And they have pleaded an interest in the king which cannot be tried without making him a party. Wherefore petition the king, &c.

A. D. 1431. *Year Book*, 9 *Hen.* 6. *p.* 2. *A. D.* 1431.

Lord Fitzwalter brought an action of trespass for breaking his park, &c. and taking divers, to wit, four deer, against A. and B. who pleaded not guilty; and A. was found guilty; and as to the breaking the park and taking the deer, 40*l.* damages were given against him. And B. was found not guilty, and upon that the plaintiff prayed special judgment upon the Statute of West. 1.—

Newton. The action lay at common law, and the penalty is given and increased by the Statute. But the Statute does not give a new writ, therefore the judgment shall be according to the Statute.—*Rolf.* By no means, for then the writ should say contrary to the statute, for there is a statute against ravishing a woman with the goods of her husband; and an action lay at common law likewise in that case. And now, if the husband has recourse to the general action which lies at common law, he shall have no other judgment but that which the common law gives, &c. So it is in this case.—*Babington.* When an action is brought at common law no other judgment shall be given but that by common law. And especially when a statute is made which provides a further penalty, and an action may be maintained upon this statute, and the plaintiff refuses this and avails himself of the action at common law, I say he shall have no farther advantage than the common law allows. But when an action lies at common law, and a statute is made relating to the same subject, which gives a greater penalty than that at common law, and one cannot maintain an action on the statute, but in the same form as that at common law, in such case the plaintiff shall have the advantage of the statute, because he cannot have another writ, &c.; and the distinction is a sound one.—*Paston.* In my opinion the plaintiff in this case shall have special judgment, for the statute is general, because in every case in which a man transgresses the statute he incurs the penalty of the statute, and if he is indicted and attainted of this he shall be fined according to the statute, notwithstanding the indictment makes no mention of the statute.—*Babington.* I doubt it, for every indictment is the action of the king.—*Cottesmore.* There is a statute *de monialibus abductis*, and a writ of trespass lies at common law, and it is at any one's option to bring the action at common law or on the statute, which two modes of proceeding require A. D. 1431.

A. D. 1431. different judgments.—*Cand.* This is by the express words of the statute; and in the writ of waste, which lies in any case at common law, the party shall have damages and his judgment according to the statute, notwithstanding the writ makes no mention of the statute.—*Babington.* In special assize the plaintiff shall recover double damages if the defendant is found a disseisor by force of the statute, and yet the writ makes no mention of the statute, and the reason is as before, because there is no other form of a writ of special assize than that which lay before the statute. But in this case at bar the plaintiff might have brought his writ upon the statute.—*Paston.* These damages are too great, and therefore we ought to diminish them, &c.—*Chant.* Sir, you cannot, for you may increase but you cannot diminish, &c.—*Cottesmore.* Why cannot we as well do one as the other. —*Newton.* For then the party cannot have attaint for the damages.—*Babington.* He may nevertheless very well have attaint in my opinion, for notwithstanding the court diminishes his damages, still the false oath is not excused on this account; in like manner, if the jury give too small damages and the court increase the damages, still the party may attaint the jury for giving too small damages. *Godred.* By no means, for you will not increase the damages but at the special prayer of the plaintiff. And there is no reason why the party should have this advantage and the power of attainting too.—*Paston*, to the plaintiff. Why should you not be amerced twice to the king in 200 shillings, for every default in a plea at bar shall be amerced in 100 shillings, and one of the defendants is found not guilty, except of breaking the park and killing one deer, and you have stated four deer to have been taken, so your writ is incorrect, therefore you shall be amerced in 100 shillings; and it was also found that one of the other defendants was not guilty, for which you shall be amerced another 100 shillings.—*Chant*

It is an entire verdict and one original writ, &c. And in replevin, 18. Ed. 3. the defendant avowed, and issue was taken that the place in which, &c. was out of the plaintiff's fee, and yet he was not punished according to the statute of Marlebridge, because the action was not founded on the statute, &c. 47 Ed. 3, 10. 12 H. 4, 3. A. D. 1431.

Year Book, Michas. 10 *Hen.* 6. *p.* 9. *A. D.* 1432. A. D. 1432.

A man brought a writ of trespass against another for entering his dove-cote and taking 200 pigeons and other goods with force and arms, &c.—*Chant.* As to coming with force and arms, &c. and as to the other goods, &c. we plead not guilty ; and as to the entry and taking of the pigeons, plaintiff can maintain no action, for we say that before the supposed trespass in the same vill you gave us licence to enter into the said dove-cote and to take pidgeons, therefore we did enter and take them, as we well might ; and we demand judgment if the action will lie.—*Newton.* You entered with force and arms of your own wrong, without this that we gave you a licence. *Prest et alii è contra.*

Year Book, Michas. 10 *Hen.* 6. *p.* 16. *A. D.* 1432.

In a writ of trespass for entering his warren and taking his hares and rabbits with force and arms.—*Chant.* He had no such warren. *Prest.*—*Newton.* This is no plea.—*Bab.* Your plea amounts to no plea ; for it amounts to no more than not guilty, for if he had no warren you are not guilty ; therefore answer over.—*Chant.* Not guilty. *Prest et alii è contra.*

Year Book, 11 *Hen.* 6. *p.* 34. *A. D.* 1433. A. D. 1433.

Trespass against one, stating that he had entered his warren and taken ten couple of conies and six partridges —*Cand.* We say as to the whole, except two couple of conies, not guilty ; and as to these we say that at and before the time of the supposed trespass we were seised in our demesne, as of fee, of forty acres of land in the

A. D. 1433. vill of *A.* in which he supposes the trespass, and we took the said conies in the said land; and we demand judgment, if an action will lie without shewing title.—*Rolf.* It would have been a good plea to say that the place in which, &c. is our freehold, and to demand judgment if an action can be maintained without shewing title, &c.—*Haran.* He pleads so in effect.—*Ellerker.* We have declared that he took the conies in our warren, and as to this he says nothing but that he took them in his freehold, and there we may have warren as well.—*Martin.* So you may have such profit in another's freehold so that of common right you cannot claim a right of warren in another's freehold without shewing title: wherefore, &c.—*Ellerker.* He took the said conies in other 11 acres of land called *G.* which is, and was at the time of the supposed trespass, our freehold, in which we have warren. Judgment, and we pray our damages, &c. without this that you took them in your freehold.

A. D. 1440. *Year Book, Mich. Term,* 18 *Hen.* 6. *p.* 21. *A. D.* 1440.

In trespass de parco fracto contra formam statuti it is not necessary to shew title in the declaration.

The defendant cannot plead specially a demise of its being park without also shewing a right of entry in himself.

A writ *de parco fracto* was brought by one *A.* against *C.* and declared according to the statute, &c.—*Markham.* What interest have you in the park?—*Faith.* What is that to you. The defence of the injury lies upon you.—*Markham.* Sir, the statute upon which the action is founded gives a penalty of imprisonment against those who are guilty, &c. and other penalties, namely that they shall abjure the realm, unless, &c. Which penalties I am not to suffer, though I have taken his beasts unless he have park, which he cannot have except by prescription or grant from the king, wherefore he must shew how he had park.—*Paston, J.* Plead at your peril.—*Markham.* Then we say that neither you nor your ancestors, whose heir you are, &c. nor those whose estate you have, ever had park in the place in which, &c. from time whereof, &c. nor that our lor

the now king, nor any of his progenitors, have ever granted you licence to have park there; and we demand judgment, if you can maintain an action without shewing this specially.—*Fortescue.* What is this plea to the purpose? If I bring a writ of trespass against you for breaking my close, or for having fished in my several fishery, it is no answer for you to say that we have nothing in the said close, &c. without shewing specially, &c. for this amounts to not guilty; so in this case, if I have no park there you may plead not guilty.—*Markham.* I plead in this case in this manner to avoid the penalty.—*Ascough.* I do not know how you will plead this, unless you wish to shew special matter by which it is lawful for you to enter into the said park, as for instance, that before the inclosure it was your common chase, and that he had imparked it, and that you had entered as into your common chase, without this that either he or his ancestors *ut supra*, &c. (and to demand judgment, if action, &c.) and then perhaps this may be a good plea to the action; but now notwithstanding any thing you have said, he might have had a warren there then, and have made a park of it now; and in that case he would have park against all the world, except the king; wherefore, &c.—*Fulth.* If he had park of his own making, then he shall not have this action, but a general writ of trespass, for as to the power of the statute, there is no reason why he should be so punished, unless he had park in fact, and this ought to be shewn thus by special matter, as Martin Ascough has well observed, &c.; or you may say, that this which he calls a park is a close, and claim to yourself a right of entry, and this is good pleading, &c.—*Port.* No, sir, this cannot be pleaded, for if I bring a writ of trespass for taking and carrying away my horse, and you justify of my own wrong, what is this to the purpose; so in this case, for the plaintiff complains of an injury to his park, and the A. D. 1440.

A. D. 1440. other justifies the entry into his close; what is this to the purpose?—*Markham*. It seems to me that it is shewn that the defendant has a park by the manner in which I have pleaded, and that my plea is sufficient for this purpose, as in an assise of rent brought against me I might well say that the land, &c. is *hors de son fee*, and to demand judgment, if without shewing title, so to compel him to shew the nature of the rent, &c.; so in this case, the plea which I have pleaded to compel him to shew what he has in the park.—*Paston, J.* If the plaintiff had pleaded that the king had granted him this park, or that he had it by prescription, then it must have been replied to him as extensively as he had declared, that is to say, to traverse the prescription or to plead, "*nul tiel record*;" but now you answer to him by traversing the prescription, and he has not pleaded this; and as to the case of assize of rent, &c. the cases are not similar, for when a man demands rent, by this shall be intended rent service prima facie because this rent is by common law. But if it be rent of another sort, for instance, rent charge, it is a thing against common right, which the court will not intend, unless it be specially shewn that the rent is of such a nature; and that is the reason why the tenant by the law may compel the plaintiff to shew what rent he demands, to wit, that it is *hors de son fee*, &c. But no man has a right of park by common law. But he must in all cases have it either by grant or prescription. So there is no occasion for you to have the plea which you have pleaded, to compel the plaintiff to shew how he is entitled to the park, &c. And so, sir, when the plaintiff has shewn it is rent charge, the tenant may depart from his first plea, (that is to say,) that it was *hors de son fee*, &c.: and plead another bar, for he may traverse the prescription, if the plaintiff shews that for title, or he may traverse the deed of grant, if he shews that for title. But in our case, as soon as he

shews a grant of the king of park, or by prescription, A. D. 1440.
you are precluded from departing from your first plea in bar, and from pleading anew, but must maintain this. To what purpose then will it be to shew that you have a right of park, when you cannot depart from your first plea?—*Ascough.* It appears to me that the plaintiff has a park against the defendant, for the above reason. But the greater part of the court were against him, and thought he had only a close.—*Paston.* You may plead not guilty, and the plaintiff may give in evidence that it is a park, and the defendant that it is not, &c. And if by evidence the jury find that it is a park, then they may well find him guilty, and so he shall suffer the penalty of the statute, and not otherwise.—*Markham.* No, sir, if I plead not guilty, then I affirm that this is a park.—*Fulth.* You may claim to yourself a right of entry in the park, suggesting that it is a close and not a park, for he shall not have a traverse to the right of entry, but must maintain that it is a park.—*Markham.* Sir, in the Exchequer, &c. the mayor and commonalty of a town had a suit, and the defendant shewed that they were not a corporation by the king's charter, but a corporation from time, &c.; and they demanded judgment, if without specially shewing, &c. And, sir, Rolf demurred to this plea, and truly it was adjudged good; and I have seen the record of it.—*Paston.* Plead then at your peril, and do not argue the case any further.—*Markham.* We will plead. And at a further day he recites the case and pleads as before.—*Paston.* This plea is to the action, and does not compel the plaintiff to plead specially. Wherefore consider of it.—*Markham.* Then we say, by way of protestation, that you have no park there, either by prescription or grant, &c. And for plea we say, that there is a certain highway adjoining to the pales of this close, which is called a park, leading from such a town unto such a

A. D. 1440. town, and the defendant was passing along the same way, and led with him a brace of greyhounds in a couple; and a deer escaped over the paling into the said high way, and the dogs from their eagerness broke the couple and killed the deer, without this that we were guilty in any other manner of breaking your park, or chasing, &c.—*Paston.* This is no plea, for you have not admitted by your plea any breaking or any chasing in the park, &c.; what is it to the purpose then to say that in fact there was no other manner of chasing?—*Markham.* Sir, it is a common plea (if you bring a writ of trespass against me, for breaking your close in a certain vill) for me to say that I have another close in another vill, in the same county, and that I broke as it was lawful for me to do, without this that I was guilty in any other manner, so it may be done here.—*Paston.* Suppose that a writ of trespass was brought against a man for battery in one place, and you justify in another place in the same county for an assault made upon you by the plaintiff, without this that you was guilty in any other manner, &c. And in this case, if you was found guilty in the place in which you justified your wrong, it is found against you, and on this verdict you shall render damages, and so it will be if you are found guilty in the other place, which you have not mentioned: but as soon as it is found that you let your greyhounds go, of your own accord, into the highway, or in any other park out of his park, you shall not render damages. Wherefore, &c.—*Fortescue.* Truly in this case of breaking close he ought not to have pleaded in the manner he has, but in battery, as Master Paston has well said, and also in a writ *de bonis asportatis* to plead in this manner is sufficient.—*Newton* and *Ascough.* If you had said that the deer re-entered the park, and that the dogs followed it, without this, &c. as before, perhaps the plea would have been sufficient, &c. And then he says as before.

that the deer re-entered the park, and that the dogs followed it, and that he did as much as he could to call them off, without this that he was guilty of this in any other manner; and as to the taking and carrying away of his deer, not guilty.—*Fortescue.* We have declared for a buck, and he has justified for a deer.—*Newton.* That is sufficient, for it is said without this in any other manner, which goes to the whole matter.—*Fortescue.* Then as to the taking and carrying away, we plead that he is guilty, and this we are ready to verify, &c. And as to the breaking of the park and the chasing, we say that you entered into our park of your own wrong, and let your dogs go of your own accord, and hunted as before, and this we are ready to verify, &c. *Et alii è contra.* A. D. 1440.

Year Book, 22 *Hen.* 6. *p.* 52. *A. D.* 1444. A. D. 1444.

A writ of trespass was brought by the Lord de Beamond and J. Duchess of Norfolk, then his wife, against the Duke of Norfolk and several others, for having chased in the warren of the said duchess when she was sole, and there taken and carried away 20 leverets and 200 young rabbits there found, &c.—*Moile.* We say that the said duchess, at the time that she was sole, gave licence to the duke of Norfolk, for him and his servants to hunt in the same warren when he pleased; wherefore the duke by force of the aforesaid licence chased in the said warren, and took and carried away the said leverets and young rabbits, with three brace of dogs; and therefore we pray judgment, if action, &c. And the others justify as servants of the said duke.—*Bingham.* What licence have you?—*Moile.* The plea appears to me to be good; and the plea was held good by all the court, without shewing licence in writing, and then Bingham traverses the licence.

A plea of licence to hunt in a warren is good, without shewing that it was in writing. Br. Ab. Trespass, pl. 161. S. C.

Year Book, 22 *Hen.* 6. *p.* 9. *A. D.* 1444. Br. Ab. Trespass, pl. 162. S. C.

A writ of trespass was brought *quare clausum fregit*,

A. D. 1444. six young goshawks in their nests, of certain value, thence took and carried away.—*Moille*. We pray judgment of the writ, for unless the goshawks are declared to be reclaimed and tamed, this writ does not lie; for a writ of trespass wherefore with force and arms he took and carried away seven deer of a certain value is not a good writ unless it says six tame deer, or else "wherefore he broke his park, and took and carried away *his* deer, there found and being."—*Ascue*. In the register there is such a writ of trespass for a sparrow hawk, why then may there not be such a writ for a goshawk?—*Newton*. The writ is good; and so it is "wherefore he broke his close and took and carried away six deer of him there found," &c.: but if the writ were wherefore four goshawks, or six deer at D. found, &c. he took and carried away, the writ would not be good. For in like case let us suppose that I have heronsewes frequenting my close, and a stranger takes them away, I shall have an action of trespass, *quare clausum fregit*, and six heronsewes there found, &c. took and carried away.—*Moile*. I understand that if I have a rabbit warren, and one enters the warren and takes my young rabbits, I shall have an action of trespass against him; or if one enters my park and take my deer I shall have an action of trespass against him. The reason is that in this case, the law intends the property in the beasts to be in me; but a writ wherefore he broke my close, and took, &c. six young rabbits there found, &c. or took six deer there found, &c. is not a good writ, as I understand, for in such case, unless the beasts be domesticated, no property is adjudged to be in me.—*Newton*. The writ is good in both cases; which was agreed to by the court, where the argument went for nothing. (But observe in the case at bar, and the other cases cited, the damages shall not be assessed according to the stat. of West. 1st.) Wherefore *Moile* said, that

A declaration of trespass for entering close or a park and taking goshawks is good without shewing that they were reclaimed.

the plaintiff made one Gilbert warden of the said close, in which, &c. for the term of his life, and gave the said Gilbert licence to give the deer, which were in the said close, and also the sparrow-hawks and goshawks which frequented and built in the said close, to whomsoever he pleased. Wherefore the said Gilbert gave the said goshawks to the defendant; and therefore we pray judgment, &c.—*Prisot* demurred to the plea upon which the justification was adjudged good; wherefore *Prisot* said that he did not give such licence to the said Gilbert, and this he is ready to verify, &c.; whereupon issue was joined, &c. A. D. 1444.

Year Book, 28 *Hen.* 6. *p.* 29. *A. D.* 1450. A. D. 1450.

To a declaration in trespass for fishing in a several fishery, liberum tenementum is a good plea.

In a writ of trespass the plaintiff declares that the defendant entered his warren, and took his eels; and also that he had fished in his several fishery with force and arms in such a place.—*Yelverton* for the defendant. Sir, as to all the trespass, except the fishery, not guilty, and the other side do the like; and, as to the fishery, action ought not to be maintained, for we say that the place in which you declare the fishing to have been, is a stream running from Stoke-green to Stoke-marsh, and we say as to parcel of the said water, shewing it by bounds of two greens which were in the same water, that at the time of the supposed trespass, the soil upon which the same parcel of water runs was our freehold, and we took the fish there as it was lawful for us to do. Judgment, &c. And as to the fishing in the rest of the same place, we say, that we and our ancestors have had common of piscary from time whereof, &c. and we fished as making use of our common.—*Fortescue*. This is no plea, for we have declared for taking fish in our freehold, and you justify in parcel of the water, because the soil, &c. is your's. This is of no avail in my opinion; wherefore, &c.—*Paston, J.* Suppose I bring an

A. D. 1450. action of trespass against you, for having taken my beasts of your own wrong, &c. It is a good plea for you to say, that the place, &c. at the time of the supposed trespass, was your freehold, and you found my beasts damage feasant there, judgment, &c.: for by that plea it shall be understood that I had no right there, unless I shew it, &c. Wherefore it should be shewn on my part, if I have a right of common there, so in this case, when he complains against him for his several fishery; and the defendant says, that this was his freehold, &c.: then it shall be understood that the plaintiff has no fishery there unless he shew in what manner, therefore it seems the plea is good.—*Fulthorp*. There is a great difference between your case of trespass and this case, for in this case the plaintiff has shewn at first that he entered into the soil, when he said that the defendant fished in his several fishery, which fishery he could only have with the freehold. So in this case, suppose I bring a special writ of trespass on the case, declaring that there I have a common by grant or prescription, in which I put my beasts to use my common, and that you took them of your own wrong, &c. There it is to no purpose for you to say that it was your freehold, for that must appear, and still I have common there as I have declared, and which is shewn by my declaration at first. But it does not appear thus in an action of trespass, but only that the beasts were wrongfully taken; wherefore, there it was a good plea, but not in my case, *ergo* not in the case at bar.—*Yelverton*. In your special action which you have brought, it cannot be intended by any means that the freehold is your's, but another's, because you cannot have common in your own soil, and this clearly proves that it is nothing to your case. But in our case, if the freehold be the defendant's, it shall not be intended that any one has a several fishery except the defendant himself, unless the contrary be shewn, be-

cause by common intendment the soil carries with it the several fishery, and the soil and the several fishery may be in one person, and so there is a great difference between your case and the case at bar, wherefore in our case the plea is sufficient.—*Fortescue*. If this be a plea, it must be a justification, or otherwise it will be merely a traverse to his action; but that it is not a traverse clearly appears, and that it is not a justification I will prove, for this plea may stand together with our declaration, namely, that it is his soil, and yet is our several fishery, and then to say that it is his soil is nothing, because we are thereby in no wise ousted of our several fishery, and so it cannot be pleaded to any purpose.—*Paston*. So it may happen that it is my several pasture, and still that you have a common therein, and yet *primâ facie* it is a good plea for me to say that it is my freehold as above, as in the case which I have put before. And it may be that you broke my close, and the freehold is your's. As in case you let to me the same close for a term of years, you have no more business there during the term than a perfect stranger. And as to the breaking, it is a good plea for you to say that the freehold was in you at the time, then I shew the lease in support of my case. So in this case, though the freehold be in the defendant, and the several fishery in the plaintiff, still it is a good plea to say that the soil and the freehold were in him as above; and then the plaintiff must shew how he had several fishery, to wit, by prescription or grant, &c.; wherefore this manner of pleading is good, &c.—*Fullthorp*. In your case of breaking close, where the defendant pleads that it is his freehold, it shall be intended by this that the plaintiff had no right there unless he shew it; but in our case the plaintiff has declared by his writ that he had several fishery there, and so has shewn how from the beginning. And if the fishing be not several as to him, then it shall be understood by this

A. D. 1450.

A. D. 1450. word several, that no one has fishery there except him, to whom it is several; then when the plaintiff has shewn that it is his several fishery, and the other says that the soil is his, still this does not prove that he had a right of fishing where it is several to the plaintiff; wherefore it seems that this is no plea.—*Paston.* What do you call your several fishery?—*Fullthorp.* All the water.—*Paston.* No, sir, but your several fishery is the right which you have of fishing in the water, and no one can have this right of fishery but yourself; for if I grant you a several fishery in my water, this does not preclude me from fishing there likewise: then since I may fish there, it is because the freehold is in me as in this case, as also in the case which I have put, of a lease for a term of years; for when I entitle myself to the freehold, then I am entitled to every thing incident to the freehold, &c.—*Fortescue.* Sir, in my opinion if I have a several fishery in any water, then no one may fish with me; and, sir, also, though the defendant has claimed the freehold to himself, yet he must traverse the plea by saying, without this that he had several fishery there, as in assize the tenant entitles himself to the land, by the dying seised of his ancestor, after which he entered, and gives colour, &c. Now, if the plaintiff make title by this, namely, that a long time before his ancestor had any thing therein, a stranger was seised until, &c. this is not a sufficient plea without pleading likewise, without this that his ancestor died sole seised, and yet the ancestor has made no mention of any sole seisin, &c. and *a fortiori* he shall take a traverse in this case.—*Paston.* I should have good reason to shew that the plea will not be good in our case, but in an action for breaking close it will be good, &c.—*Yelverton.* If one grants a several fishery, and gives you seisin by a deed, I say that the soil passes by the deed, and this proves that the fishery is incident to the freehold.—*Fortescue.* Truly in this case nothing

shall pass by the deed.—*Yelverton.* Yes, truly, and so it has been determined.—*Ascough.* If I grant to one to have a several fishery in my water, to take what fish he pleases for his own consumption for ten years, and then I grant to another to have a several fishery in the like form, then, if the first grantee bring an action of trespass against the second grantee for having fished in his several fishery, he shall be justified by the grant made to him by the owner of the freehold, therefore *a fortiori* the owner of the freehold himself (where trespass is brought against him) may justify, because the freehold is in him, and therefore it appears that the justification is good *prima facie.*—*Fullthorp.* No, sir, for if I grant to you common for one thousand beasts in my several pasture, and then I grant to another, in the same several pasture, common for five hundred beasts, then, if on account of the second grant the first beasts have not sufficient, I say that the second grant shall be void, and so in the second grant of fishery, &c.; which *Paston* denied; and *Markham* then said he would plead to the justification. A. D. 1450.

Year Book, 34 Hen. 6. p. 28. A. D. 1456. A. D. 1456.

A writ of trespass was brought, wherefore the defendant with force and arms entered the free warren of the plaintiff at D. and there, without licence, chased and took, and carried away hares, &c.—*Laicon.* Sir, to this we say, that the place in which, &c. is one hundred acres of land, which said land is, and at the time of the supposed trespass was, the soil and freehold of one Thomas, and the said Thomas, before the time of the said trespass, gave licence to the defendant to enter into the said land, and chase there, &c. Wherefore at the time when, &c. he entered and chaced, as it was lawful for him to do, &c.; and therefore we demand judgment.—*Billing.* Sir, this is no plea, for notwithstanding he pleads that Br. Ab. Warren, pl. 2. S.C.

A. D. 1456. the soil was the freehold of a stranger, or even if he should say that it was his own freehold, this cannot be a good plea to the action for it may well happen that the soil is his freehold, and yet we may have warren therein.—*Laicon.* If it be so, then it is necessary for you to shew your title to the warren, for you cannot have a warren in another's freehold but by prescription, for the king cannot grant you a warren on another's freehold, but on your own freehold he may, &c. It is no plea for you to say, that the freehold is your's, without this that you have any warren there, for this is no issue: and so to plead not guilty, &c. where we have ground of justification, is dangerous, &c.—*Littleton.* It appears to be no plea, for in a writ of trespass for breaking a close, &c. it is a good plea for the defendant to say that the soil in which, &c. at the time when, &c. was the freehold of the defendant, for this is a good justification to every common intent, but it is not so here. When the writ declares, wherefore with force and arms, &c. he entered his free warren, &c. and the defendant says that the soil is his freehold, this is an insufficient answer, for it may happen that it is his freehold, and that another has warren there, &c.—*Chole.* It appears to me that it is *prima facie* a good plea, for the plaintiff does not alledge, either by the writ or declaration, any matter of title to the warren, and this is a thing against common right as a rent-charge, &c.: but if he chooses to take a writ, reciting his title in that writ, then it is no plea to say that the place in which, &c. is our freehold, it is necessary in that place to answer to his title, and to traverse it, or avoid it by special matter: but in the case at bar in which he declares, it is generally a good plea *prima facie* to plead our freehold, and the plaintiff on his part to shew his title, which is then traversable, but not before.—*Danby.* The plaintiff has declared wherefore with force and arms he entered his free warren, therefore it seems to me that it is a good plea

for the defendant to say that it is his freehold, without this that the plaintiff had any warren there, &c.—*Davers*. This cannot be, for perchance the plaintiff has wrongfully claimed to have warren, and has wrongfully made use of such warren during that time, then if this shall be put in issue, it will be dangerous to let this go to a jury.—*Priset*. This issue cannot be as you say, for it is only argumentative. As if I bring a writ of trespass wherefore with force and arms he broke my close, it is no plea to say that I have no close; or if it be a writ *de bonis asportatis*, to say that the plaintiff had no goods, &c.; wherefore in such case it is necessary to plead not guilty; so in this case, if the plaintiff has no such warren he may plead not guilty, otherwise plead special matter in order to avoid his action in this case, &c. As if perchance the plaintiff had warren for a certain time in the warren of another, &c., as one may have by prescription, and then the defendant has released or otherwise extinguished the warren, &c. Wherefore *Prisot* says to *Laicon*, Have you any thing more to say, for it seems to me that your plea is insufficient? &c.—*Laicon*. Then we will imparl, &c. On a further day *Laicon* pleads that the place in which, &c. is forty acres of land, which was at the time when, &c. the freehold of J., which J. gave us licence to hunt in the said place in which, &c., by virtue of which we hunted, &c. as it was lawful for us to do; without this, that the plaintiff had any warren in the said land, and we demand judgment, &c.—*Billing* objects to this plea, &c.—*Prisot*. You, the defendant, are a stranger to the land, and a trespasser, how will you justify by discharging any land of the warren? But if the land in which, &c. was your freehold, perhaps you may be discharged of the warren by shewing special matter, yet still this plea is no plea, as you were privy to the land, &c.; for this amounts to not guilty in my opinion.—*Moile*. It is A. D 1456.

A. D. 1456. proper to try this matter, for it appears to me hard law to make the defendant plead not guilty, and to leave the matter to the discretion of the jury, in which case if it is found against him, he will suffer long imprisonment and abjuration of the realm, and still the plaintiff has no warren in fact, which would be an inconvenience and a mischief too, wherefore it appears that he should be allowed to plead in this manner, &c.; and then *Laicon*. Sir, we do not wish to shew any thing else, &c.—And *Billing*, He objects to the plea, &c.; and they join in demurrer, &c.; but the demurrer was not entered, but the parol was continued by imparlance to the next following term, &c.

Year Book, 34 Hen. 6. p. 43. A. D. 1456.

Bro. Ab. tit. Trespass, pl. 34. S. C. In a writ of trespass *quare defendant vi et armis liberam warrenam ipsius querentis intravit, et in eâ sine licentiâ ipsius querentis fugavit et lepores, &c. cepit et asportavit, &c.—Laicon*. The action ought not to be maintained, for we say that the place in which he alledges the warren to be, is, and at the time of the supposed trespass was, the soil and freehold of one A.; wherefore the same defendant, as the servant to the said A., and by his command, entered, and there chased, as it was lawful for him to do, &c.; and we demand judgment, if, without shewing title to the warren he ought to have his action, &c.—*Wangf*. This is no plea, for in no case shall the defendant ever compel the plaintiff to shew his title, except in case where the plaint is for the recovery of the specific thing demanded, as in assize of rent, or in a *quod permittat*, in which case the plaint is for the recovery of the rent, or the common, or the like; but in this case of trespass the plaintiff does not recover the warren, but the damages for the tort; and this was assented to.—*Moile*. The plea is not sufficient, as has been said, to this in-

tent, to compel the plaintiff to shew his title, for the defendant ought to plead in discharge of the warren, by way of bar, that is to say, that the plaintiff or his ancestors were not seised of the soil in their own demesne, as of fee from time; whereof, &c. in which case the plaintiff may make to himself a title to the warren by grant of the king. If he were tenant of the soil or otherwise, the defendant may plead that the plaintiff had no warren.—*Danvers*. Sir, the servant cannot plead in discharge of the warren, for he had no interest in the land, &c.—*Prisot*. Likewise in this case, as in a general writ of trespass, the servant shall say that the place in which, was the soil and freehold of his master, &c. and he shall take issue on the title of right in the same writ, &c. But where *Moile* said it was a good plea to say that the plaintiff had no warren, it seems to me that this cannot be pleaded, for if a man bring a writ of trespass against me, *de bonis*, &c. it is no plea for me to say that he had no goods, for if that were the case, he might as well plead not guilty, &c.—*Moile*. But in a writ of trespass *quare vi et armis*, *A. D. servientem* of the plaintiff *verberavit*, *&c.* In this case it is a good plea for the defendant to say that he was not servant to the plaintiff, or to plead not guilty, &c. But if the defendant beat a man, and a stranger alledges that he is his servant, in a writ of trespass, when in truth he never was his servant; and if the defendant plead not guilty, &c. in this case he admits that he was the servant of the plaintiff, &c.; and if the jury find that he beat him who is said to be his servant, notwithstanding he never was his servant, in this case it shall be found against the defendant; wherefore in our case it would be mischievous not to be allowed the plea, namely, that the plaintiff had no such warren, &c. On a further day *Laicon*, for the defendant. Sir, we say, that the place where the plaintiff supposes the warren to be, is, and at

A. D. 1456.

A. D. 1456. the time of the supposed trespass, was the soil and freehold of said A.; wherefore we as servant, &c. and by his command, chased there without this that the said plaintiff or his ancestors ever had any warren in the said place in which, &c.; or that he or any of his ancestors had any thing in the freehold. So not guilty, &c.—*Wangf.* Sir, we pray that the whole plea be erased from the roll, except not guilty generally, for the whole of the matter which is shewn is only evidence, &c. And so the matter which he has shewn is matter of justification, which he cannot do and plead not guilty at the same time, &c.—*Laicon.* Sir, in a writ of trespass, *quare clausum fregit*, it is a good plea for the defendant to say, that the place in which, &c. is, and at the time of the trespass, &c. was his freehold; wherefore he entered, and so not guilty; or to plead a feoffment, or his ancestors having died seised, so not guilty, &c.—*Danby.* Truly this cannot be, for one is contrary and repugnant to the other; when he pleads that the place in which, &c. was his freehold, and that he entered, and so is not guilty, &c.; he cannot enter without being guilty.—*Moile.* In assize it is a good plea, and oftentimes it has been customary to plead the feoffment of a stranger, or the dying seised of one's ancestors, &c. so he entered without committing a tort. &c. But in a writ of trespass to justify his freehold and that he entered, so not guilty. This cannot be by implication, for when he has shewn his special matter this implies, that the plaintiff had no warren, &c. And after concluding not guilty, this conclusion implies that the plaintiff had warren; for when any one brings a writ of *clausum fregit*, or the like, &c. and the defendant pleads not guilty, by this plea will be understood and implied that the plaintiff has a freehold, and that the defendant is not guilty of the entry on his freehold wherefore, &c.—*Laicon.* We will say no more.—*Wangf.* I do not demand beyond rule; wherefore, &c. And then on a further day special matter was ousted by

award of the court, and the entry on the roll was not guilty generally, &c. A. D. 1456.

Year Book, 35 *Hen.* 6. *p.* 55. *A. D.* 1457. A. D. 1457.

William Pecke, knight, brings a writ of trespass against a man, declaring that he has chased in his warren, and taken and carried away hares, young rabbits, &c ; and the defendant comes and says, that the place in which, &c. is the manor of D. in which manor the plaintiff has nothing, except jointly with two others, who are living, and not named, &c. ; therefore we pray judgment, &c.—*Boef.* This is no plea, for we have complained of the hunting in our warren, and he pleads joint-tenancy of the land, which is a thing totally different from what we complain of, and therefore this is no plea.—*Laicon.* It appears to me that the plea is well enough, for we have shewn that the place in which, &c. is the manor of D., in which manor the plaintiff has only replied joint-tenancy, which is sufficient to abate the writ, for by common intendment the warren is incident to the land and of the same nature, and so it will be understood that the warren is parcel of the manor, and therefore the writ abates.—*Littleton.* The contrary appears to me ; for the plea is a plea to no intent, for one may have warren by divers means, namely, by grant of the king in one's own land, or by prescription in the land of another : then, if the case be such, (as it may be) that he have warren in another's land by prescription, and he purchase, with others, the land in which he had warren, still he has sole warren, and if trespass be committed in the warren, he shall have sole action, and still he holds the land jointly with others, but the warren is several to him ; then the writ is well brought, and the writ shall not abate, &c.—*Danby.* I well know that a man cannot have warren except by the means which have been mentioned ; but in my opinion it shall be here understood that he had warren, as is most

Br. Ab. Warren, pl. 3. S. C.

Bro. Ab. title Extinguishment, pl. 5. S. C.

A. D. 1457. common, and this shall be in his own land, as in othe land; and therefore it shall be understood, *primâ facie* that the plaintiff has warren in his own land, and the this plea is well enough, as in a writ of trespass for cuttin grass, so it seems to me that the plea is good.—*Billing* It appears to me that the plea is not sufficient; th when any one wishes to plead in abatement to a writ, is necessary that his plea be good to every comme intent; and also by his plea he ought to give t plaintiff a better writ, then if the writ thus brought ma be good, notwithstanding this plea, then it is not a goo plea. And in my opinion this clearly proves that t writ may be good, and although the plea is true; for I have a warren in another's land, and then I purcha the land, with others, and a trespass is committed in t warren, and I bring a writ of trespass, and the defenda pleads in the same manner as this defendant pleads present, still the writ is sufficient, for the others have interest in the warren, so it may be here, and therefo in my opinion, the plea is insufficient.—*Moile*. It a pears to me that the plea is insufficient, for one pers may have warren in another's land, and so may plaintiff here, for neither one nor the other appea and, in my opinion, forasmuch as the plaintiff has shewn in what manner he has warren, his declaratio not good; but that is not the point in question, a therefore I do not wish to say more on this subject; b as to the plea, it cannot be good; for, where it has b said that one may have warren in another's land by p scription, and if he purchase the land for himself a another, still the warren continues in him solely, an he purchase the land to himself alone, he may alien land to a stranger, and then the warren is gone, and it is not parcel of the land, but only a royalty in land to have the beasts and fowls; but, inasmuch as the alienation of the land, his right in the said lan

gone, this is the reason why the warren is gone, and when A D. 1457.
he repurchases the land he shall not have back the warren. But if one have warren in another's land, and purchases the land, and then he alienes it, reserving the franchise to himself, this is good, and this shall cause the warren to remain in him, and by these means one may have warren in another's land by grant of the king; as if the king grant to one a warren in his own land, and then he alienes the land, reserving to himself the warren, then he shall have the warren, and the land belongs to a stranger, and thus he has warren in another's land by grant of the king; and, therefore, it may be that he has warren to himself only, and that he holds the land jointly with another, and therefore the plea cannot be good. But if I have common appendant in a pasture, and a stranger makes pits or ditches in the pasture, so that I cannot have sufficient common, and I bring a writ of trespass against him, here it will be a good plea to say, that I had no interest in the land to which the common is appendant, except jointly, &c.; or, if it be common in gross to a certain number, it will be a good plea to say that the grant was made to me, and a stranger who is still alive, &c.; because these pleas prove that the action ought to have been brought in the names of others also, &c.; but it is not so here, because it does not appear how he has warren, and therefore the plea is insufficient.—*Danby*. It shall be intended, as I said before, namely, that he has warren in his own land, and this is with reason, and not against common right, &c. —*Needham*. Neither one nor the other appears here, but generally common and rent are not like warren, for if one have a certain rent issuing out of the land, and he purchase the land, the rent is gone, and the law, with respect to common, is the same, for this reason, that a man cannot pay rent to himself, or have common in his own land, but one may have warren in another's land,

A. D. 1457. and also in his own land, for it is not issuing out of the land, nor payable moreover; but it is, as has been said, a realty, and a privilege in the land, and not in any other thing; wherefore, &c.—*Ashton* says to the defendant, answer over.

Bro. Ab. Tit. Warren, pl. 7.

A warren does not pass as an appurtenant to a manor.

A man seised of a manor in which he has warren makes feoffment of the manor, with the appurtenants, the warren does not pass by these words; which observe.

Year Book, 36 Hen. 6. p. 24. A. D. 1438.

A. D. 1438.

A writ of trespass was brought by one man against another. He alledges, that the defendant had broke two nets in his several fishery, put there for taking fish, and two hundred eels there being took and carried away, &c.; and the defendant demands judgment of the whole, inasmuch as the plaintiff alledged that he took two hundred eels, being in the nets, without saying *his* eels, &c.

Year Book, 2 Ed. 4. p. 4. A. D. 1462.

A. D. 1462.

Br. Ab. Licences, pl. 20. S. C. and Trespass, pl. 295.

In trespass *de pareo fracta*, rehearsing the statute of *W. 1. c. 20.* the defendant said, that plaintiff made such an one his park-keeper, to guard his wild beasts, and that the park-keeper desired him to kill two deer for him, by force of which at the time of the supposed trespass, &c. he came and killed them.—*Litt.* objected to the plea being pleaded in that manner.—*Laicon* did the same.—*Nedham* to *Laicon*. The park-keeper himself had no power to do this, how then can he give it to another?—*Moile*. The plea appears to me good enough, for I fancy, that a bailiff may give a licence to a man to occupy the soil with his cattle, and if the lord bring trespass against him, might he not shew the licence, and have a good justification on this account? If it be so there, it will be so here.—*Choke*, on the other side. There is a great difference between the two cases; for the bailiff, by virtue of his office, hath power to let the

Barre, 88. Br. 295. Done. Br. 56. Bailiff, Br. 32. Leases, Br. 34. Licence, Br. 20. Contract, Br. 37. Debt, B. 147. Bailiff. 14 Ed. 4. 8.

land to others at will, and for the same reason he may give a licence, or pray others to put their cattle into the land, and so he is accountable to the lord, thus the lord may recover against him; but here the park-keeper has only the keeping of the wild beasts, to preserve them safely against malefactors. But, sir, I will put a case like this: If I have a shepherd who desires, or gives a licence to a person to kill a sheep, shall I not have an action of trespass? Surely I shall; so observe, this difference is a good one, as I think.—*Laic.* It appears otherwise to me, and the plea is good; for, if I go into a tavern, and the waiter gives me a pot of wine, or if I go into a mercer's shop, and the servant gives me a piece of linen, shall the masters have an action against me? Surely not, nor shall the person in this case.—*Choke* to *Laicon.* There is a difference between all your cases and the one at bar, for in your case about the mercer, the servant has the power to sell the cloth, or to exchange or give it out to others at his discretion, but the park-keeper has no such interest by his office, he has only the bare keeping of the park; but in your case, if the servant in a shop (who is not the servant who has power given him by his master to sell) give the cloth, I say the master shall have a writ of trespass against him who takes it by the gift of such a servant; and, sir, in the case at bar, the head park-keeper had no power to kill any beast, how then can he by any means give a licence to another to do so? I say he cannot. And if the case were, that I bailed goods to F. to keep for my use, and F. gave them to one G., I well know that I cannot maintain trespass against G., for he had legal possession of them, by reason of the bailment, and by his gift the property is vested in the donee, and so there I shall have a good remedy against F. by writ of detinue.—*Moile.* So, I think, you have an action on the case against the park-keeper.—*Choke.* No, sir, this cannot

A. D. 1462.
3 H. 4. 14.
10 H 6.
27 Ass. 5.
8 Ed. 4. 11.
12, 13.
8 Ed. 4. 11.
13 H. 4. 2.
14 Ed. 4. 8.
W. 1. c. 20.

A. D. 1462. be, for at common law I have no remedy for killing beasts, but generally a writ of trespass, supposing *quod clausum fregit*, and this on account of breaking my close, and entering my soil; wherefore, if I wish to have any remedy, I must bring an action upon the statute, and this I cannot have against him.—*Litt.* to the same purpose. The plea is bad, and to prove that an action lay against a man, who, at the commencement, came by legal means to the goods of a man, or at his entry into another's land was justified, I fancy, that if I distrain legally for my rent, and then willingly kill the beast, I say the tenant shall have a general writ of trespass against me and so also of my entry into the land; and I suppose
38 H. 6. 27. that if I bail my robe to you, and you burn it, I shall have a writ of trespass on the case against you, in the same manner, of the bailee, who has the custody of my beasts, I shall have an action upon my case, &c. against
7 H. 4. 15. 3 H. 4. 14. 11 Ed. 4. 7. 8 Ed. 4. 13. him, &c.—*Moile*. This last case I deny, for he is chargeable by me in a writ of accompt, and so he has power to give or sell them to another, which vendee may kill them; but, if he had the custody of an ox, for the purpose of drawing the plough, then the case would be different; and if the bailiff makes a lease, rendering rent to his lord, then he shall have a writ of debt; and any one hunts in a park, and kill no wild beast, then no action lies. But observe, if he shall be found guilty by verdict, he shall have benefit of the statute, as was adjudged *quinti quinto*.—*Nedham*. There is a difference where a man who has the keeping of my goods gives them to another, and where a stranger takes them out of the possession of him who keeps them, and gives them to another; for, in the first case, the property was in me so that he who takes by force of the gift of a person having no property in them, shall be adjudged a trespass against me; but, in the other case, the property was out of me at the time of the gift, and in him who gave them

as to the writ against the donee, it was held by some apprentices, that if livery was made by the vendor, then no action lay, if not, then it did, &c. 27 H. 8. 13.—5 H. 7. 10. a.—10 H. 7. 6.—16 H. 7. 3.—21 H. 7. 39. 22 H. 6. 59.—5 H. 5. 1.—W. 1. c. 20. A. D. 1462.

Year Book, 4 *Ed.* 4. *p.* 29. *A. D.* 1461. A. D. 1464.

In an action of trespass, plaintiff supposed that defendant had taken fish in his several fishery in a certain vill, &c. and the defendant said that he himself is seised of a house and of eight acres of land, and six acres of meadow, in the same vill, in his demesne as of fee, and that defendant, and all those whose estate he has in the said messuage and land, being tenants of the said house and land, have had common of fishery in such a place, from such a point to such a place as appendant to such a house and land aforesaid, &c. And the place where the plaintiff supposes the trespass to be done, is between these two bounds in the same place; and the defendant fished, as he well might.—*Fairfax*. This is no plea, for if he has common of fishery as appendant, it appears that he may have it in another place.—*Choke*. Yes, sir, well enough, as well as common of estovers, housebote, and haybote, appendant; thus it is of a several fishery; it is possible that a man may have such fishery appendant.—*Danby*. Common of pasture appendant, and common of fishery in gross, are usual, the one as well as the other, therefore the pleading is good enough. —*Fairfax* answered over, and pleaded in bar, &c.

Br. Ab. Trespass, 306. S. C.

Comen, 8. Appendant, Br. 19. Incident, Br. 19. Trespass, Br. 206.

Year Book, 5 *Ed.* 4. *p.* 26. *A. D.* 1466. A. D. 1466.

In a writ of annuity, brought by a man who claimed to have an annuity on account of the office of keeper of the park; it was granted to him to have this annuity for term of his life, for the office of keeping the park, &c. And it was pleaded by the defendant that this office was granted to plaintiff, &c. and to have so

A park-keeper will lose his office and annuity, by negligence in his duty.

A. D. 1466. much, &c.; and that such office had been there from time immemorial; and that all those who had had the office of park-keeper, had as well the care of the woods and wild beasts as of the park itself, &c.; and that on a certain day, to wit on the second day of July, in the second year of the now king, until the 14th day of July then next ensuing, twenty-two wild beasts were killed through the negligence of the said plaintiff, by strangers not known to the said defendant; and for all that time the said plaintiff of the guardianship of the park aforesaid was negligent, &c. on account of which matter he demands judgment if this action can be maintained. And this plea was challenged, because there was no matter shewn for which plaintiff ought to forfeit his annuity, for it is shewn that the wild beasts were not killed by the advice or consent of plaintiff, but by strangers against whom plaintiff can have no action; but defendant may have his remedy, as if I have your goods in my care, and strangers take them out of my possession, as because they found my house open, or if they be stolen, you may have your remedy against the trespassers; or, if I be the steward of your court, and hold the court, although it be not held as it ought to be, yet shall I not lose my fee, if I perform the office reasonably, &c.; so the park-keeper aforesaid shall not lose his office, although strangers did take wild beasts in his absence, or presence where he consented not to it, although it was done, yet defendant shall have his remedy by action on the statute, for his park being broken and his wild beasts taken, &c.—*Yonge* for defendant. It appears by our plea, that default in guardianship and negligence in his office is attributable to plaintiff, for it is shewn how by his negligence in the performance of the duties of his office, and by his default, between such a day and such, so many wild beasts were taken and killed by strangers, in which case this negligence in the

guardianship of his office, shall cause him to lose his fee, for, if I have a steward of my leet, and he has an annuity for it, and he ought to hold it twice a-year, (to wit) the month after the feast of Easter, and the month after Michaelmas, and does not perform the duties of his office diligently, but keeps the leet eight weeks after, these leets are void, and all the presentments and profits, which the lord should have from the nature of his leet. In this case he does keep the office of his leet, but he misuses it, and on account of this misuser shall lose his fee, as well as for a nonuser of his office; for, if he does not use his office, so that the whole default of keeping it is in him, his annuity shall be extinct on this account, and so it shall be if he misuse it, for I have no remedy for his misuser, but to keep back his annuity, for each of us shall have a *quid pro quo*, inasmuch as his office is well kept, he shall have his fee for the duty done, and I shall have the profit of the office for the annuity which I shall pay him, and if he misuses his office, and does not take care of it, but at his own pleasure, and negligently, and, from his default, strangers take my wild beasts, and the profits of my park, as wood and other such things, where, if he had kept a reasonable watch, they could not have done it, but by his negligence my park is wasted in its wild beasts, in its wood, and its grass, his annuity and his office shall be extinct for this; for if I have a butler, and he has a fee in being such officer, (or any other office of this sort,) and he has an annuity of me for this, if he leaves the door of my house open negligently, by which strangers enter and carry away my goods, he shall lose his office and his annuity for this, for *idem est insufficienter facere, quod nihil vel non facere, &c.*; for, if my servant go but for a day from me without my leave, and so depart negligently, I am not bound to pay him his wages for time to come, nor to receive him again, without I myself wish it, &c.—*Choke.* A. D. 1466.

A. D. 1466. The plea of the defendant appears to be good enough; for by his plea the defendant shews a default in plaintiff in the performance of his office; for if, by the negligence of plaintiff in keeping the park, the wild beasts in the park or the wood is wasted, there is no reason to give him his fee, for the park-keeper is bound to watch the park in a reasonable manner, but to say that he shall stand there every day, this need not be, as I think, but it is sufficient that he employ himself in his office three or four days in a week, and not be there every day, for if he be guarding the park and performing his office three times in four days, or three times a-week, this is a sufficient watching by him, &c.—*Danby*. It is hard to take issue upon the matter alledged by the defendant, if he says nothing more.—*Choke*. Yes, sir, issue may be taken upon this, and it may be traversed well enough; for if the fact be as defendant hath said, that by the negligence of plaintiff, &c. and by his negligent keeping of the park, defendant hath suffered waste, it is reasonable that the park-keeper should be punished for this default, and this can be done in no other way, but by estreating his office and his annuity; for, for nonfeazance of an office, the officer shall lose his annuity; so, too, if he misuse it; for if my steward of my courts does not perform his office, and does not keep my courts, or if he keeps the court, but misuses the office out of its course, as if he keeps the court, but will not inquire of, nor make any profit to the lord from the court, and so by his negligence and default the court is misused, he shall lose his annuity and office for this. And so the park-keeper aforesaid, if he has misused his office, though he perform his duty now, yet by the misuser as well as by the nonuser he shall lose his annuity, where by his negligence and default the park is wasted; and so the issue may be taken upon his negligence or default, as that the wild beasts were not killed, and taken, and carried away

by his negligence and default, for then it is not reasonable that he should give account of them, if strangers have taken them without his assent, and not by his negligence and default, but if the park be wasted or destroyed by his default and negligence, it would be otherwise; and as to its being said that the defendant might have his remedy against the trespassers, as to this, it does not disprove his remedy against the park-keeper; for, if I lease land to you for a term of years for life, rendering certain rent, upon condition that if you commit waste I may re-enter, and waste is committed, shall not I have a writ of waste because I can enter? This is no good argument, for it is in my election to have either; for I have at my election two remedies for the punishment of this waste, by the common law by writ of waste, or otherwise by the covenant made between us; and so in the case aforesaid it is in the election of defendant to punish the strangers for the trespass in his park, or otherwise to take his remedy against plaintiff for the nonperformance of his office, and for his negligence in attending to his office.—*Vedham*. A park-keeper is not bound to be in the park every day, but a reasonable guarding is sufficient, for on festivals and Sundays he ought to be at divine service. So in the night he is not bound to watch, but may take his rest. So every day he may take his meals, and for such times and other reasonable times he shall not answer nor be punished, nor prevented from having his annuity for the nonfeazance of watching at this time, for he is not bound to be there every day on the watch, but at reasonable days and times. So, if many come with force, as six, or eight, or twenty, against him into the park, to take wild beasts, or destroy the park, where it is against his will, and where he cannot contend with them, nor recover the beasts, for no law or reason shall compel to fight against so many, and to turn them out by force, for he has no power against so many; but if he does his part, as far as was A. D. 1466.

A. D. 1466. reasonably in his power, it is sufficient. And he is not bound each day or any day, to find six or seven men, or more, or fewer, to guard the park, but only is he bound to guard it in his own person, where he does it reasonably in his own person, and it is sufficient for him to do it at divers reasonable days and times, for no law shall compel him to do more; but if at a reasonable day or time the park is wasted by his negligence and default, then it is right that he should answer for this; and for such cause and default he shall lose his office and his annuity. For in Brandon's case lately, about the Marshalsea, he was at his office day and night; but he misused it, for, by his own act and negligence, he suffered divers condemned prisoners to escape; and by this he lost his office, which was for term of life, which he had by grant before, and the grantor entered and gave the office to another. Thus it is with a gaoler, if prisoners escape by his default and negligence at a reasonable time, he shall answer for them, and shall lose his office by the misuse, as well as for nonuse. But if in the night, or other such time, the prisoners break open the prison, escape, and force through the guard, and go their way, nevertheless there is no default or negligence in the gaoler; but, where he is negligent or faulty, he shall answer for this, and be punished; and so of the park-keeper aforesaid, he shall answer for his negligent keeping and default; for, if by his default at a reasonable time, or by his negligence, the park is waste, he shall be punished for this. So this is in issue for to alledge that they were killed by strangers not known to him, at an unreable time, as in the night, or at any other time in the day with multitudes and force, without this that they were killed by his negligence or default, this shall be good issue, for, for his negligence and default, he shall answer, &c.—*Arderne.* Your plea contains more than is necessary, for you have alledged in your plea, that all men being in and having this office in this park, have had the

charge of keeping the said park, in the woods and other profits of the said park, as well as in the wild beasts, and this it is not necessary to alledge, for of common right, and by the common law itself, this belongs to the office of park-keeper, and every park-keeper ought thus to guard his park. But, as to the pleading the killing the beasts by the negligence of plaintiff, I should wish to hear the words of the plea in this matter.—*Yonge*. You shall hear, but as to alledging the matter of fact before, this plea is not worse on this account, for then, this shall be accorded by the common law, and truly such an office as this has been held there and of right the officer should be there, and also it has been the custom for the park-keepers to keep the park as aforesaid, and, therefore, that I might not be concluded afterwards upon this, to make sure I put the matter in the plea.—*Arderne*. This is not necessary, as appears to me, for the same charge is the entire duty of every park-keeper, to wit, to guard the whole; for, this word *park* includes in itself many things, to wit, the inclosure and all within it, wild beasts, woods, and corn, and all such other things, and profits annexed to and comprised in the park, and also the inclosure and the freehold.—*Danby*. Although thepleading be in these words, that, by the negligence of the plaintiff, the wild beasts were taken and killed by strangers, not known, &c.—*Yonge*. The plea is that the plaintiff from such a day to such a day, to wit, in twelve successive days, *custodire parcum prædictum neglexit* in which time twenty-two wild beasts were taken and killed by strangers.—*Danby*. It is hard that this plea should be good, for this matter is not certain; and what do you mean by this word *neglexit*.—*Yonge*. He was negligent in the keeping of this *tota curia*. This is no issue, for *neglexit* is that he refused to keep the park from such a day to such a day, &c.—*Danby*. It is well that you take notice of this pleading, for it is not A. D. 1466.

A. D. 1466. certain to say thus, that he refused to keep the park from such a day to such a day, &c.—*Yonge*. We say then that from such a day to such a day, *parcum prædictum non custodivit*, and in the mean time the wrong was done, &c.—*Danby*. This is the better plea and much more certain, &c.

Year Book, 5 *Edw.* 4, *p.* 53. *A. D.* 1466.

Br. Ab Warren, pl. 6. S. C. In a writ of trespass *quare, &c. liberam warrenam suam*, in such a vill *fregit et coniculos, &c. cepit et fugabit*, &c. the defendant said that the place where plaintiff supposed the trespass to be done is three acres of land; and we say the plaintiff was seised of them in fee, and leased thence to such a one, to have and to hold them at will, by force of which, &c. And the defendant, by his command, entered and took two rabbits there; and we demand judgment, if, without laying any title, this action should be maintained, &c. And the court said to the defendant, give this up, for the term is at an end, we cannot attend now to argue matters in law, &c. And plaintiff said, that if he would not put in some other plea, he should demur to him, &c. And then defendant said, that plaintiff was seised of so much land as aforesaid in fee, and leased the said land to such an one at will, &c. and he by his command entered and took the rabbits; and he prayed judgment, if the action, &c.—*Danby* to the defendant, This is no plea, for the rabbits passed not by the lease with the land, for they are not parcel of it, &c.—*Catesby*. If this were in a general action of trespass for his close broken, and his rabbits taken, the aforesaid taking would be good, and the entry too; for in a writ of trespass for his close broken and his trees cut, it is a good plea for the defendant to shew a lease to a stranger at will or for term of years, or for life, and that defendant by the command of the lessee, entered and cut the trees, or by force

of a lease made to himself he cut the trees, &c.— A. D. 1466.
Danby. This is apparent, because in a general action for breaking his close and taking his rabbits, a lease made to defendant of the close, or to a stranger, would be a good plea, and that defendant by his command entered and took the rabbits, and yet it appears that the rabbits pass not with the land.—*Catesby.* The lessee or another by his licence may take them legally, if they be upon the land.—*Danby.* The action here is more special than the general action of trespass, for the action is brought here for breaking his warren. Then *Catesby* passed over this; and pleaded as before, a lease made by plaintiff to a stranger at will, and that the defendant by his licence took the rabbits there, &c. and prayed judgment, if without shewing some title this action can be maintained. To which plaintiff said, this is no plea, for he affirms the freehold to be in plaintiff, and plaintiff may in common intent well have warren in his own demesne land. Therefore if defendant will stand to this plea we will demur to it.—*Catesby.* This manner of pleading is in our books, in the way I have now pleaded; for to say that you have warren, or that the freehold is in a stranger, or in defendant in which you claim warren; we pray judgment, if without shewing a title, you can maintain this action. And this manner of pleading was used in the time of King Henry the Sixth.—*Danby.* This action, as I have said to you, is more high and especial than a general writ of trespass for breaking his close; for in a general action of trespass it is common pleading, and good pleading for the defendant to plead and lay the freehold in a stranger, by whose command or licence he entered, or to lay the freehold in the defendant himself; and such bar shall compel plaintiff to shew his title, for his action is not certain. But the action now brought for his close broken is a special action, and he ought to have a more special plea than you

A. D. 1466. have now pleaded, therefore give this up, for we cannot let you delay now, as we might at the beginning or commencement of the term; no more can we argue matters of law. And therefore give it up, or we shall deliver and record what you have said, for the term is at an end, and we wish to finish to-morrow. —*Moile* to *Catesby*. By your plea you assert the freehold to be in plaintiff, and have said, moreover, that a lease at will was made to another, and let this lease be at will for term of years or otherwise, and as the freehold is in the plaintiff it seems this plea is not sufficient, for in common intent plaintiff may well have warren in his own freehold.—*Genney* for plaintiff. If he will not give it up, we will demur in law to him.—*Danby*. And we will record it, and it shall be entered if he will not give it up.—*Catesby*. Sir, then we say that the place where the plaintiff supposes the trespass to be done is three acres of land, as aforesaid, which land was the freehold of such an one, &c. at the time of the supposed trespass, and the defendant by his command entered and took two rabbits, without this that the plaintiff has any warren there in the said land.—*Genney* This is no plea, for it sounds double; one part is that the freehold is in another, and the other the traverse &c.—*Danby* to *Catesby*. I wonder at you that you will not plead otherwise; and you should plead otherwise for we cannot now argue matters in law, on account of the end of the term; therefore do give it up.—*Catesby* This manner of pleading is frequent in our books.—*Danby*. What is that to us? We cannot argue the law of this now, whether the plea be good or not, plead differently at your peril, or this shall be entered, &c.—*Genney* for plaintiff, to *Catesby*. Acknowledge the warren, and justify then by the lease and command, &c.—*Catesby*. This we will not do for the two rabbits; and you have no warren there but by your own use, for yo

have no grant from the king or his progenitors, nor by prescription; therefore I will not acknowledge that.—*Genney*. Plead then not guilty, for, if it be so, you are safe enough, &c.—*Catesby*. This we will not do, and put into the power of the jury to presume a warren from the use and claim of one for twenty or forty years, without any grant or prescription, &c.—*Genney*. The plea you have pleaded amounts to nothing but not guilty, for you lay the freehold in a stranger, and justify the entry and taking the rabbits, by his licence and command, without this that we have any warren in the said land, and this is nothing but not guilty, and amounts to no more; therefore no more shall be entered.—*Catesby*. As to two, or for two rabbits, we will not plead not guilty, but we would rather the law should adjudge according to our matter, and our matter is such as we have pleaded, &c.—*Genney*. If you will not plead otherwise I shall demur.—*Catesby*. I have no other matter.—*Genney*. To a plea pleaded in this manner no law commands us to answer, &c. So we demur, &c. A. D. 1466.

Year Book, 5 *Edw.* 4. *p.* 121. *A. D.* 1466.

A man cannot at this day have a warren but by grant of the king; yet by prescription he may have it, for this may have a legal commencement before time of memory. So a man may have a leet by prescription, or a park, or view of frank pledge; yet if a man would have these things begin at this day he must have a grant from the king by patent, &c.

Year Book, 8 *Edw.* 4. *p.* 5. *A. D.* 1468. A. D. 1468.

In K. B. it was said by Lakin that an action of trespass *quia warrennum fregit et perdices*, &c. it is not necessary to mention the value of the partridges, &c. nor pheasants, &c. in the writ, &c.; and so trespass for a couple of hounds taken. Br. Ab. Trespass, 315. S. C. 10 Ed. 4. 15. 12 H. 8. 5. Tresp. Br. 115. Faux form Br. 82.

A. D. 1469.

Year Book, 9 *Edw.* 4. *p.* 47. *A. D.* 1469.

22 H. 1. 38. *Nota per Catesby.* A man cannot ease his warren for term of years without deed, notwithstanding it is a chattel; nor can a man grant his presentation *hac vice* without deed, &c.—*Choke.* In your case a man cannot let his presentation without deed, yet the parson may lease his tithes without deed, &c. *Perk.* 14. *acc.* 21 *Ed.* 4. 22. *and* 15 *H.* 7, 8. *auterment* 21 *H.* 7, 23.

19 Hen. 8. 12. Lease Br. 17. Feoffments, 92.

A. D. 1476.

Year Book, 16 *Edw.* 4. *p.* 1. *A. D.* 1476.

In trespass the parties were at issue, and stayed till the jury now appeared; and one juror was challenged, because the king had granted to him the custody of such a forest for term of life, and that the said plaintiff is master of the game of the forest; and this was not taken for a principal challenge, &c.

Challenge Br. 171.

Year Book, 16 *Ed.* 4. *p.* 2. *A. D.* 1476.

Br. Ab. Trespass, 387. S. C. In trespass for taking hawks, the defendant under the general issue may prove a demise of the locus in quo to him. Genl. Issue B. 43. Leases Br. 44. 12 H. 8. 1.

In a writ of trespass for certain goshawks wrongfully taken, defendant pleaded not guilty, and on this a ven fa. was awarded, and the parties continued till the jury appeared; and when plaintiff had given his evidence defendant gave his to the jury, (to wit,) that the gos hawks were in a wood of plaintiff's, which he leased t defendant for a term of twenty years, and said that th taking was within the term, and so he was not guilty and this was held good evidence. *Quod nota.*

Year Book, 16 *Ed.* 4. *p.* 7. *A. D.* 1476.

3 H. 7. 58. 43 Ed. 3. 24. 22 H. 6. 26. Propertie Br. 30. Tres. B. 387.

Et nota. At this time a writ came to the Chancer to be sealed *quare vi et armis columbas suas cum patello aliis ingeniis cepit*, &c. And it was asked of the serjeant what they thought of such writs, who said, that *quar vi et armis* was not maintainable, in a writ upon his case but of his dove-cote broken, and his, &c. *quare vi et arm* is good. *Quære*, Shall he have an action on his case sinc

the doves were flying, and had no marks by which they might be known, &c. A. D. 1476.

Year Book, 16 *Edw.* 4. *p.* 7. *A. D.* 1476.

Schagh v. Philpot and others. Edmond Schagh brought a writ of trespass against Roger Philpot and others, for entering his house, and taking and carrying away a goshawk, and a sparrow-hawk, of the goods of the said Edmond.—*Catesby*. You have here the said R. who says that as to coming with force, &c. he is not guilty. And as to the taking the sparrow-hawk, he says by protestation, that the sparrow-hawk is of no value, &c. And for a plea, he says, that the said R. had a dove-cote adjoining to the said house, &c. and Br. 387. that the said sparrow-hawk, at divers days before the taking, and at the taking, flew at the doves of the said defendant, on which account he took the said sparrow-hawk in the said dove-cote, as he well might, which matter, &c.

Year Book, 17 *Ed.* 4. *p.* 6. *A. D.* 1477. A. D. 1477.

Sir Wm. Calthrop brought an action of trespass, and alledged that defendant had fished in his several fishery, the defendant says, the place where, &c. is, and at the day of the trespass was our freehold, &c.—*Pigot*. This is no plea, for possibly he may have granted us a several fishery in his own water, and the soil and freehold is in the lessor; yet he cannot fish there, as it would be in case of a warren or chase. And so it was held lately in the case between Strangwyche and Conyers.—*Choke* to the same purpose. This is not like the case of an assize for rent, for there I grant, that it was out of his fee, is a good plea *primâ facie*; and the plaintiff shall produce his title, for it shall be intended rent service until plaintiff has made a title to another rent; but here it shall be taken that plaintiff had a free fishery in the soil of defendant, as may well be intended. But, with regard to

Br. Ab. Trespass 336. S. C.

Br. 358. 34 H. 6. 28. 10 H. 7. 25.

A. D. 1477. warren or chase, they should be by grant of the king, or by prescription; wherefore, &c.—*Brian.* The plea appears to me good, for there is a great difference between *separalen piscariam* and *liberam piscariam*, for no one can have a several fishery, except in his own land, and thus solely to himself. But a free fishery I may grant to twenty in my pool, for, if no one disturbs him, he has a free fishery. *Quod.—Littleton, concessit.* But *Choke* said, that he knew no difference between them, for he said that he who had a free fishery had it solely. —*Brian.* No, I will shew you the difference, if I have a great close and you three have three closes adjoining mine, I may grant to each of you to have *liberum ingressum, et egressum* over my land to yours, so thus a man may have free fishery in another's soil, but not several. The writ is *speciali piscariâ residuum.* Pasch. 18 Ed. 4. p. 4. In trespass plaintiff declared that defendant had fished in his several fishery, &c.; defendant said that the place, &c. is ten perches in length and twenty perches in breadth, covered with water, which was his freehold at the time of the supposed trespass, and there he fished as he well might. And it was held a good plea by the whole court. But *Genney* wished defendant to say that the water was his as well as the land, &c. And it was said to him by the court that he could not have an assize for water only, &c. 17 *Ed.* 4. 6, 9.

41 Ed. 3. 20. —7 H. 7. 3. —4 Ed. 3. 38. —11 H. 6. 34. —20 H. 6. 4. —18 H. 6. 29. —10 H. 7. 24. —43 Ed. 3. 13.—3 H. 6. 12.—34 H. 6. 43.—17 Ed. 4. 7.—10 H. 7. 25, 26.—12 H. 7. 4.—10 H. 7. 26. Bro. 336.

Year Book, 18 *Ed.* 3. *p.* 8. *A. D.* 1478.

A. D. 1478. A man was indicted in K. B. because he with force and arms had broken the dove-cote, and took twenty young pigeons, which could neither go nor fly, on Monday next before the feast of the Purification of the blessed Virgin Mary, in the 10th year of Ed. 4, at C. in the county of M. feloniously took, &c. And this was adjudged an indictment, notwithstanding the exception of the party to the pigeons, because the property of the

A. D. 1478.

said pigeons was always in him to whom the dove-cote belonged, inasmuch as they could not go out, but he might take them at any time at his pleasure; but it would have been otherwise had he been indicted for taking old pigeons, for the law adjudges them to belong to no person, and the property of them to be in no one; for they go out over all the country, so he could not take them at pleasure, and therefore, if a person be indicted for this, the indictment is void. So if a person be indicted of felony for taking pike or tench out of a pond or trunk, the indictment is good; *causa qua supra*; otherwise, if they were taken in a river. The same law is of young goshawks, which cannot go or fly, engendered in my park, it is felony; but not so of other goshawks; and so observe the difference where the property is in me at my pleasure, and where not, &c. 40 Hen. 6. 30.

22 Ass. 95. 18 H. 8, 9. Bro. Coron. 164.

10 E. 4. 15. Stanf. 25. c.

Year Book, 18 *Ed.* 4. *p* 18. *A. D.* 1478.

In a writ of trespass, *quod parcum suum fregit et feras, ibidem cepit et abduxit*, the defendant pleaded in bar that plaintiff gave licence to one Ashton to hunt in the said park, and to kill three bucks and to take them with him, and to dispose of them for the honour of plaintiff, &c.; and then the defendant, as servant to the said Ashton, and by his command, entered into the said park, and hunted down the three bucks, and took them to his master, which matter, &c.—*Hussey*. I think the plea is bad, for there is a difference when I give my horse to another man, or any other thing, and licence him as above, or to come over my land to church, for where I give my horse to a man the property is instantly in him, and he can command his servant to take him, and the servant may execute such a gift for the use of his master; but here the licence given to the master could not by him be parted with to another, and no one except him could have it, for it is a thing for the pleasure of a person

Bro. Ab. Licence, pl. 12. S. C. Trespass, 340. S. C.

Tres. B. 348. Done B. 34. Licence B. 12. Propertie B. 31. 13 Ed. 4. 10. 13.

A. D. 1478. which cannot be used by another, but by himself, &c.; wherefore, &c.—*Tremaile.* It appears to me otherwise, for there are many things which may be done by a servant, as if he sells a horse for his master the contract is good, and also his receiving money for his master is good; and it would be inconvenient that the master should go a hunting alone, for there are divers things which are done to a deer when it is killed which it would be inconvenient for the master to do; and in every case, where in any thing a man may be aided or assisted by another, to the profit of him to whom the licence is granted, in such case he may command another to do this, as the case is here.—*Brigges.* In the cases which have been put, that which tends to the pleasure of the person of the man himself, this can be done by no other but the man himself, to whom the licence was granted as if I grant to you to be in my house for the space of three hours, can any other person have the pleasure of this sport, besides him to whom the licence was granted. No, surely. And so I think that if I grant you a deer this grant is void, for I cannot grant that which I have not in myself, and no property lies in deer, for they are *feræ naturæ* and wild beasts, and the property can be in no one; and before the stat. if any man had taken away deer and killed them, he would have no remedy. So this licence is in a manner void, &c.; wherefore &c.—*Sterkey* to the same point. If I grant my horse to you to ride to Canterbury, I fancy you cannot let any of your servants ride that horse, but you must ride him yourself; for it is a grant to you and no one else; so if I grant you to send three cows to common in my land for half a year, you cannot send the beasts of any other man into this common; and so it has been well said, that those things which it is incidental for the party himself to do cannot be granted to another. And too, as has been said, no property in bucks exists in any one, and

12 H. 7. 25. Perk. 21. 13 H. 7. 13. 7 H. 4. 57.

8 H. 7. 7. 22 H. 6. 58.

22 E. 4. 6.

15 Ed. 3. 26.

this well proves the writ, which shall not be *quare feras* A. D. 1478.
suas cepit, but *quare pareum suum fregit et feras ibi-* 3 H. 6. 57, 58.
dem cepit, so the plea is not good, &c.—*Townsend*, on the other side. There are divers things which cannot be done by him to whom the licence is granted, as if I grant to you that I will make a forge, or a house for you, now I shall bring masons and carpenters to do this, for I cannot do it myself. *Quod fuit negatum*. And in the case which has been put, where a way is granted over a man's land to church, in case it be granted to a great man, as to a Lord, it is not right that he should go alone without any servant, and so here, &c.—*Chok*. If I grant 10 H. 7. 13.
to you to hunt and kill a buck in my park, if you do kill the buck you cannot take it away with you. *Quod* 13 H. 7. 13.
12 H. 7. 25.
fuit concessum by all the judges. And so the cases that have been put of a licence for the pleasure of a person, this should be acted upon by him alone, as if I ask you to come with me to eat, you cannot bring any one with you, nor can you grant this to another, and you cannot by courtesy change the law, for courtesy would that a man should bring his servants with him, but this cannot be; and I say too that where the principal thing cannot be done by a stranger, the accessary cannot; for this licence to hunt is the principal, which is a pleasure to his person which cannot be done by any other; then if the principal thing cannot be done, he being absent, the accessary, (to wit,) the killing of the buck cannot be done by the servant, for he cannot kill the deer without hunting, and this neither the servant nor any other person can do, except him to whom the licence was granted, the law is the same with regard to a hare in a warren, &c.—*Brian, J.* The plea appears to 12 H. 8. 4.
me to be good. I grant you that if a man grants *omnia* 10 Ed. 4. 1.
averia sua, that the deer enclosed in the park pass not, 10 H. 7. 7.
13 H. 7. 10.
and yet if he be outlawed in trespass the king shall kill 5 H. 7. 1.
and dispose of them to his own use, and there is a

A. D. 1478. difference where I have a thing by reason of the nature of the thing itself, and where by reason of my land, as in the first case I have the beasts by reason of the nature of the beasts themselves; and the deer I have by reason of my park, and not by reason of themselves. And I say if I have a black deer amongst others in my park, I may give it, &c. and the grant is good; and where I have two parts amongst others known, I may grant one or both, and the grant is good, because it is certain what thing is granted, so this licence is equivalent to a gift, &c.; wherefore, &c. 13 H. 7. 19. 2 W. 1. c. 20. 12 H. 7. 24 and 25 acc.

A. D. 1484. *Year Book*, 2 *Rich.* 3. *p.* 15. *A. D.* 1484.

A custom for the owner of land where cygnets are hatched, to have the third is good.

In a writ of trespass in the King's Bench, brought by Lord Strange and J. Charlton, knight, it was counted by *Vavisor* that the three defendants had taken and carried away the cygnets of the plaintiff, in the county of Bucks, to their damage of 10*l.*—*Brown Apprentice*, for one of the defendants demanded judgment of the writ; for he said, that the property of twenty of the said cygnets, at the time of the taking, belonged to Lord S. alone, without this, that the other had any thing in them, &c.—*Prest.* And we demand judgment of the writ for them jointly. And he said also, that, as to the other twenty, that the property at the time, &c. was in J. C. alone, without this, &c. and demanded judgment, &c. And for the other of the defendants, he said, that this action could not be maintained against him, for, as to all the cygnets but fifteen, he pleaded not guilty. *Prest et alii è contra.* And, as to one of the fifteen, he said, this action would not lie against him. For the river Thames runs through the whole realm, to which the county of Bucks is adjoining, and we know that the custom of all this county is, and has been from time whereof memory runs not to the contrary, that every cygnet that has its course in any water

which runs to the said Thames, in the said county, if it comes upon the land of any one, and hatches there, and has a cygnet on the said land, then he who has the property of the cygnet shall have two of the cygnets, and he who the land shall have the third cygnet, which shall be of less value than either the other two; and we aver, that one of the cygnets of the said Lord S. and of the said J. C. came upon the land of defendant, in the vill where, &c. adjoining to the water which runs into the Thames, and there upon the land hatched and had three cygnets, and the defendant by reason of the custom aforesaid took the said cygnet, as of the three cygnets being of the least value; and we pray judgment, if this action will lie. And as to the residue, he said, that a long time before the plaintiffs had any thing, &c.; and that defendant was possessed of the said cygnets, as of his own proper cygnets, and, being so in possession, one J. at S. had taken them and given them to the plaintiff, and he had taken them back again; and he demanded judgment, if the action would lie.—*Vavisor.* Sir, the first plea in abatement of the writ cannot be good, for, he says, that the property of thirty, &c. was in one only, &c.; this amounts to no more than the plea of not guilty as to one of the plaintiffs; but it is otherwise in a replevin. Therefore, as to one of the plaintiffs, he might have said in pleading not guilty, and have pleaded over as to the residue; and so it appears to me that this plea cannot be good in this manner. And as to the custom which is alledged it is against reason, and such customs are void in law. For if it was the custom of a country that one who came upon another's land should have it, then he might take it and occupy it; this custom is void, for it is against common right and common reason, and so it is here, &c. *Browne è contra sed non interfui.*—*Fairfax.* As to the plea in abatement of the writ, it appears to me to be good; for, in the case that was put, A. D. 1434.

A. D. 1484. that is, in a replevin, to say that the property at the time, &c. was in a stranger is a good plea; and yet in a writ of trespass this pleading would not be available; thus it is that they differ. But here the plea is in abatement of the writ, but in the other case it was in bar. And, sir, as I think, every man shall have his action as the law gives it to him, and if the property was in common to two they ought to join, but if it was in one only, then he may sue alone, and thus this pleading is to the intent to cause them severally to bring their action according as the property is in them. For if two have lands in common, and their estate is by a several title, if trespass be committed on the land they must be joined in the action. And I have seen a stronger case than this in our books; where two were tenants in common, the one of three parts, and the other of a fourth part, there a writ of trespass for breaking their close was maintained by them, and the one had judgment for three parts, and the other for a fourth part of the damages. So that the action must be brought according to a person's title in every case, or it will abate. And, with relation to the custom, it appears good; for otherwise they might chase the cygnets out of their freehold if they would, and therefore it is reasonable that they should have the third for their sufferance, the custom then is reasonable.—*Hussey, J.* If the custom be that you should have the third cygnet, being of less value than any of the others, then you must take it at your peril, for the party shall have a good cause for trespass against you, if the contrary should happen, &c. And as to the rest *voluit advisare.* Note, The matter in dispute was as to the first part, for Lord S. had certain cock swans, and the said knight had certain hen swans, and they had the rest between them. *Quære*, How shall the action be brought. *Quod nota. Ad alium diem.*—*Hussey, J.* As to the pleas, in abatement of the writ they are good enough, for each must bring his action

according as the property is in him, and so it is with regard to land. For if the right to land be joint and the title be several, then the action shall be several; and yet in such actions upon the several title, where they have received but one injury, as in a writ of trespass, they join in the action on account of their joint possession of the land, therefore the damages cannot be severed; then it follows of course, that if one have the property in chattels, the action shall be brought by him alone, and so the plea is good. And so *Vavisor* maintained his writ, and the custom was adjudged reasonable, for if the swans come upon my land I may chase them out; but, if I suffer them to hatch there, it is a reasonable custom that I should have the third for my sufferance, and so the plea is good. Then *Vavisor* maintained his writ and answered over as to the rest of the plea. *Quod nota.* A. D. 1484.

Year Book, 5 *Hen.* 7. *p.* 10. *A. D.* 1490. A. D. 1490.

Trespass for entering a warren lies against the owner of the soil.

It was said by the court that a man should have an action of trespass *vi et armis quare warrennam suam intravit*, notwithstanding the freehold of the soil was in the defendant, for the action is not brought on account of the freehold of the soil, but on account of the warren of which the defendant could take no profit.

Year Book, 7 *Hen.* 7. *p.* 13. *A. D.* 1492. A. D. 1492.

Br. Ab. Trespass, pl. 282. S. C.

One J. S. brought an action of trespass for fishing in his several fishery; and defendant said, that his predecessors were seised of the manor in right of their church, and that he and all his predecessors have been seised of a free fishery in that place, &c. as belonging to the manor; and he alledged that his predecessor had granted his fishery to plaintiff for term of his life, and died; after whose death he was elected and presented, and fished as he well might.—*Wood.* This plea is not good, for plaintiff has complained of a trespass done in his several fishery, and defendant pleads a prescription

A. D. 1492. to have common of fishery in the place aforesaid; for he said, that he and all his predecessors have had a free fishery, which cannot be intended to be a several fishery, for one may have a free fishery in another's land well enough, but not a several fishery, &c.; on which account the plea and the colour are not sufficient.—*Keble*, on the other hand, said, the plea is good enough, for he hath alledged a grant by his predecessor; then this is good colour, that the grantee held after the death of the granter during his grant; therefore the colour is good because he might discontinue. For it was good colour in an action brought against a woman, to plead a grant by her husband in the same form. Then, if he hath pleaded from the same thing, the plea is good. Which was clearly granted by the court. Then it appears that a free fishery shall be taken for a several fishery, but it is entered several accordingly, and this is said in the entry —*Wood*. My copy is not so. *R. Quære*, If another had pleaded thus in *libera piscaria* where the writ has several fishery.

A. D. 1495. *Year Book*, 10 *Hen.* 7. *p.* 6. *A. D.* 1495.

An action of account lies against bailiff of a park.

Wm. Say, knight, brought a writ of account against John S. bailiff of his park of W. having the care and keeping of 100 deer, as well bucks as does. And the defendant said, as to the matter comprised in the count, the law was against it, &c. and demurred in judgment.—*Fisher*. I think an action will not lie upon this matter for I understand that no one can be bailiff of any thing out of which a profit would not arise by merchandize and no such thing could happen in this case, for the park is nothing but the inclosure, (to wit,) the pales walls, and hedges, and not the land enclosed, and from such things no profit can arise. And a præcipe lies not for a park. And, if I let my close to another, he shall not have the land enclosed, so, &c. And the defendant is

not accountable for the deer, for a man shall not have an action of account, unless he once had the property of the same thing of which he demands an account. For a man shall not have an account of rabbits, for the property is not in any one. So these deer are wild beasts, and the property of them is not in any one. So if one kills deer in my park, or rabbits in my warren, I can have no action against him, but for entering my close, and the plaintiff has not mentioned the value in his writ, (as *ad valentiam* of so much). So that for these causes the writ shall abate.—*Keble è contra.* Two causes have been shewn why this action should not lie; the one, because the property of the deer is not in the plaintiff; the other, because the enclosure forms the park, out of which no profit can arise. And, notwithstanding this reason, the action well lies; for the enclosure does not form the park only, without the land enclosed. And this is clearly proved by the words of the licence, which are, *Henricus, &c. concedimus quod J. S. &c. includat centum acras terræ, in D. et quod* inde *parcum faciat*, which word "*inde*" refers to all the land enclosed. If you kill a deer I may have an action upon the stat. and say "*parcum fregit.*" And if there were any herons or hawks hatching in the park, the park-keeper shall render an account of them, for this is part of the profit arising from the park; and although this writ has not been used in a case like this before now: yet when a writ has passed the Chancery, and is thus before you, it shall not abate if it can be supported by reason. And it appears by the rehearsal of the stat. of Westminster *de servientibus et ballivis*, that an action of account lies in many cases where it is not now used; for, in my opinion, where a man hath any thing in his guardianship which he must not apply to his own proper use, he is chargeable in an action of account. For an officer of this court, who has the guardianship of the A. D. 1495.

A. D. 1495. King's records shall render account of them, and so it is to the first intent. And as to the other reason that has been moved, (to wit.) that they were wild beasts, and therefore *nullius in bonis*, according to Bracton the property is in no one. Yet by the common law before the stat. of West. the First, if a stranger had killed deer in my park, although my writ mentioned not the value, yet the jury ought to assess damages, as well for the value of the beasts as for the breaking the close. So I should recover damages at this day if a stranger kills a deer in my close, because ,when the deer is in my close, no one had any right of profit from it, on account of my being nearer the possession of the beast than any other person. And a man may have an account of a thing in which he has an interest without a property, as if I have a fishery I can appoint a bailiff of it, and he shall render an account of the fish ; and in many places these are called Water Bailiffs. And he denied the case of the rabbits put by Fisher. It appears too by the Stat. of Magn. Charta, *custos sustentabit domos, parcos vivariæ*, &c. that if a guardian makes destruction in beasts he shall be chargeable in an action of waste. And I make no doubt if a guardian in socage should make destruction, as *supra*, he would be chargeable for this in his account. —*Reed* argued to the same purpose, and used the same arguments as are before rehearsed. And he said, If one had the guardianship of my dove-cote, I may have an action of account against him, because I may gain profit from them ; and he affirmed the case of the herons.—*Wood* was on the same side, and, as to the first point, he made use of Keble's arguments. And as to the second point, that the property be not in any one, the writ does not say "*feras suas*," but "*feras ibidem cepit*," therefore the action is good enough. For if I have wreck or estray by prescription in my manor, and I appoint a bailiff of these, if wreck be cast upon my

manor, and the bailiff seizes it not, but some stranger, I shall have an action of account against him; yet the property of the wreck was never in me, until it should be in fact seized, and so it was lost. And the law is the same, if I have toll of a mill, and the bailiff suffers the toll to be lost, he shall be charged as above, for he shall render an account of all he hath received or might have received, to the use of his master. And one may make a bailiff in an office; as if a man was a park-keeper for term of life, and had many profits appertaining to his office, or if a man had the ward of a common pound from one, and ought on this account to have for every beast 100 pence, he may make a bailiff of this.—*Fineaux*, on the same side, said, That a thing being in the ward of any one, if he shall be holden to make a reckoning of it, he shall be chargeable in an action of account. And it has been seen that an action of account has been maintainable against one as bailiff *hospitalis suæ rectoriæ*, and awarded good. And so the like reason may serve in this case, then this writ may be maintained as well as the other. And as to the park, the same reasoning supports one of these cases as well as the other; whether I grant to a person *custodiam parci mei*, or make him bailiff, for in both he will be accountable. But in none of these cases can the warden sell any deer without special command in writing, and if he has such warrant and does sell, he is accountable; for by the taking of them the property becomes vested in the tenant of the freehold. So for the profit of the herbage, or wood, he shall be accountable, but not for the deer, except in manner aforesaid.—*Vavisor*, on the same side. For the deer the warden shall render no account, for the property is in no one; and if the tenant of the freehold should be outlawed in a personal action, he should not forfeit his beasts; and if the deer be taken and he appoints his executors and dies, the executors A. D. 1495.

A. D. 1495. shall have no action, for the beasts taken in the life of the testator; and this clearly proves that the perty of them was not in the testator. But by a sp law, enacted in the forest law, against malefactor forest or franchises; which, being in the hands of king, shall be called forests; and this is common of the land; as is the law of the marshal or adm Thus according to the cases on this subject, he render no account of the beasts, but shall forfei office if the deer be destroyed. And for the profits he shall account according to the case move Keble.—*Brian, J.* It appears to me that he sha accountable, as well for the wild beasts as for the profits of the park; but he may be assisted in by good pleading, if the case be as I understand be. For there is a great difference between my g ing, *custodiam parci met.* and making a man my b For in the first case he has the mere power of denship and can sell nothing, but, if he does, he be punished by a writ of trespass. But where I one my bailiff, he had power to sell the wild beast in the word "bailiff" is implied ward, but *note con* And if defendant was warden and not bailiff, he be aided by pleading this. But here, since pl has supposed him his bailiff, and defendant ha denied it, but demurred, he shall be charged; for dant had an interest in the wild beasts, he migh them, and convert them to his own use, or give to a stranger, and the gift should be good. S The same is the case with regard to hares and r in my warren, but of pheasants and partridg bailiff shall render no account. And if I make keeper of my manor, and of the goods in it, he render no account, but it is otherwise of a bailiff.

Trin. 10 Hen. 7. page 30, case 28 The remainder of this case.

The remainder of the case in account by Wm knight, in the preceding Michaelmas term, whe

parties demurred to the declaration. And now *Fisher* came and said, you clearly perceive that plaintiff demands an account of the profits of his park, and also of the deer in the park, which he cannot have. For a park is nothing but an enclosure with pales, which lie not in profit, no more than where a man wishes to have an account *de quodam clauso*, which is nothing more than a hedge, which hedge lies not in account, because no profit can arise from it. And as to the deer, the action lies not, for the property in them is vested in no one, so they are not valuable: thus the action lies neither in the one case nor the other.—*Keble.* The enclosure does not form the park, but the content comprised within the enclosure of the park; and this appears by the common form of a grant of a park, (to wit,) the enclosure *tantum terræ, et parcum inde facere*, so the soil is the park, and not the enclosure. *Quod fuit concessum.* And, notwithstanding a park does not lie in rendre by the name of a park, yet this is no argument against our having an account of a park. For if I give to a man the governance of a river, he is accountable for the fish, and it may be demanded in a præcipe by the name of so many acres of land, covered, &c. And in many places this man is called a water-bailiff, which is nothing more than a servant to his master, so is a proctor. And if this writ of account passed the Chancery under this name, it must be to some one to render an account. So it should be if he had been called baily. So here, because he is called bailiff or park-keeper, he shall render account. And thus as to heronsewes, sparrow-hawks, and other such things, if there be any; every servant who hath any thing of his master's in governance shall render an account. So a man shall have a writ of account for the profits of a park, notwithstanding it has not been in use before; and also of a close, and of a A. D. 1495.

A. D. 1495. river as well as a manor. *Quod fuit concessum.* account too shall lie for deer, notwithstanding the p perty is in no one; and the reason is, becaus he had t sole interest in the soil. And if I grant to a man in a year to take a deer, a hare, or a rabbit, within my la without a warrant, it is good; because when such w beasts are in my land, I have the interest in taking the and no one else. And if I grant to my park-kee the shoulders and the haunches of any deer which sl be killed, the grant is good, and yet I have no m property in the deer than I have in the fish in a riv But yet they are casual profits, which he to whom soil belongs hath authority to take with engines otherwise, on account of his interest in the soil, and other person. And it is clear that a guardian in soc shall render an account of deer, and Magna Ch wills *quod custos, &c. sustentet parcos vivaria,* which means not the enclosure only, but the profit, wit,) the deer. And before Westm. the 1st, an ac of trespass lay for taking deer in my ground, yet should not say *quod cepit damas suos ad va'entiam tum*, but the damages in this case should be inqu into, and should be larger, and, as in trespass, shoul in the discretion of the jury. *Quod omnes justici concesserunt quoad hoc.* And also that an actio account lies for a park.

Year Book, 10 *Hen.* 7. *p.* 24. *A. D.* 1495.

Br. Ab. Trespass, pl. 426. S. C. In trespass, wherefore defendant fished in his sev fishery. Defendant said, it was his freehold.—*W* This appears to be no plea; for, as I think, this well accord with our writ, and plaintiff's declaration he may have the soil and we the several fishery, a warren, &c.—*Brian* said, that it was a good plea, a is differeat in case of warren, for a man should all how he obtained his warren.—*Keble.* This is a g

plea, for since the soil is defendant's of common right, A. D. 1195.
he should have such profits as arise from the soil, and all the profits and revenues, at the first view, and so when plaintiff alledges that it is a fishery, then there is no other profit but a fishery to arise there, which of common right ought to belong to him, as the grass in his other lands. And in trespass for taking trees, it is a good plea to say, that it is his freehold, and yet it is possible, that plaintiff might have some special interest to have the trees, as by grant, or by prescription. But these things arise to him on account of the freehold, which belongs to him, unless the contrary be alledged, it is different if they do not arise on account of the freehold. As of trespass brought for an estray, plaintiff may bring a special or a general action; and, if he brings a special action, it is no plea to say, it is defendant's freehold, for this is not appurtenant to his freehold. And he granted, that in case of warren it was no plea, because it arises not on account of the freehold, but of a grant from the king, it is different, and this is the distinction in my opinion. And he said, if a commoner be disturbed in his land, an action of trespass lies not, but an assize. And in trespass, that it is defendant's freehold, is a good plea, and yet it may be that plaintiff has a case for years, or at will. And if trespass was brought, wherefore he digged in his several pasture, *liberum tenementum* is a good plea, and there is no difference in my opinion. Remainder in p. 26. Defendant said, that 18 H. 6. 29, as to their coming, &c. and that the place where, &c. 20. 17 Ed. 4
is 10 acres, and he said that as to the trespass in one acre *actio non*, for he said, that his father was seised, and by protestation said that he died seised, after whose death the right descended to defendant, and he entered, and plaintiff claims through a deed made by his father by which nothing passed, he entered, and defendant entered upon him and fished.—*Wood* said, This is no

A. D. 1495. colour, for it is of another thing, for the action is pass, and the colour the freehold.—*Keble.* It is colour in my opinion, for he has a colour to have land, and consequently the profit, for he who ha freehold shall have the fishery, and all other things and profits; and so it is good colour i opinion. And the same case was adjudged in ti King Edw. Fourth.—*Vavisor.* It appears that the (to wit,) *liberum tenementum* was no plea, for a may have several fishery, notwithstanding the fre is in another.—*Brian.* He cannot, as it appears b means, be forced to plead not guilty; for when h *liberum tenementum*, it is possible that another may the freehold, but this is not by common intendment he may pray judgment, if the action lies. This be hard, but he may say, we pray judgment, if w title alledged, as out of his fee; we pray judgm without title alledged, and not judgment if the will lie; nor can he say in a voucher, when he vo himself, that they are the same person and not dif judgment if without title alledged, so I think it is And in an assize for common in gross, he ought t a title in his plaint, but in common appendant n one, he has of common right, the other not.—*V.* I was compelled by the court, when I was a serge say *liberum tenementum*, without this that he ha ren in the land.—*Brian.* I grant what you say is for there he shall not say or be compelled to s not guilty.—*Keble* said, that he would not depa his plea; and the other said, make up the paper

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A. D. 1496. *Year Book*, 11 *Hen. 7. p.* 8. *A. D.* 1796

Licence to a man and his heirs to hunt must be in writing.

It was said by *Keble arguendo*, if one ma licence to me and my heirs, to come and hun park, this licence must be in writing, for passes by the licence which endures for ever, b

ticences me to hunt once in his park, this is good without writing, for no inheritance passes. A. D. 1196.

Year Book, 11 *Hen. 7. p.* 19. *A. D.* 1196.

Robert Sheffild brought a writ of trespass against Lion Percy and many others. And he counted that the said defendants with force and arms had entered his close and fished in his several fishery, and had there taken 30,000 roaches, &c.; and that they had depastured his grass with their horses, and turned up his land with their swine. And the said Lion pleaded not guilty to the whole. And the others to all the trespass, except breaking his close, and depasturing his grass, pleaded not guilty. And as to that, they justified severally, because the place, &c. was a great moor, in which one Alice had common appendant to a manor adjoining, for herself and her tenants, and each of them averred that they were tenants of the said Alice, and that they severally put their own beasts there. And the said Robert Sheffild traversed the title of the said Alice with them. And it was found by the verdict that the said Lion was not guilty, and that the others were guilty of the entry into the close, and the taking of 20,000 roaches; and also of the turning up of the land with their swine; and also that the aforesaid Alice had not any such common in the moor, for herself or her tenants; and they assessed damages, for breaking the close, taking the roaches, and depasturing and treading down his grass, at twenty marks. And as to the residue they were found not guilty.—*Keble.* We pray judgment for plaintiff.—*Fisher.* We ought not to go to judgment; for divers things appear upon the record; and one is, they have justified severally, and the plaintiff has made only one replication, (to wit,) has traversed the title of the aforesaid Alice against all of them.—*Vavisor.* It appears to me that this is well enough, for to day, here before us, a

A. D. 1490. writ of trespass was brought against two, and one plea that plaintiff was his villain, and demanded judgme he should be answered; and the other justified in own right. The plaintiff rejoined that he was f and of free estate. Shew us then some other matte exception.—*Brian, J.* This is not so clear as you making it.—*Fisher.* The other is this; we have n a several justification, (to wit,) that each of us sever put in our beasts, and the damages are not severed, are given entire to the plaintiff.—*Vavisor.* This your exception the other day; but it appears to that as to this matter it is sufficient.—*Brian, J.* I not here then; but I will put this case to you. I b a writ of trespass against four men, and they four four days have committed several trespasses against and it was found the first committed the first tres against me the first day, the second the second day third the third day, the fourth the fourth day, all of t are found guilty, and yet the damages shall be seve —*Davers.* Our case is not like this.—*Brian, J.* T two exceptions come to the same point: shew us th fore some more of your store.—*Fisher.* We have posed by our writ that he had fished in our fishery, also had taken fish; and he was found guilty of ta the fish, but as to fishing in the water the jury found nothing; wherefore, &c.—*Kebl.* It s good enough in this respect too: for he has supp that he has fished in his fishery, and there has t fish; and it is found that he did take fish, and th could no do except in the fishery; and as it is fo that he took his fish, it is implied that he took the his fishery. As if I brought a writ of trespass ag one, and supposed that he had assaulted and beater and it is found that he did beat me, without sa any thing of the assault; this is good; for the ba implies an assault in itself, and yet they are se

trespasses, for a man may assault without beating me, A.D. 1496.
and render me damages for it, but he cannot batter without assaulting me. So here, as he took fish, it is implied that he fished for them.—*Wood.* It appears otherwise to me; for they are several trespasses, one is the fishing, and the other the taking the fish. For if a man fishes in my several fishery, though he take nothing yet he shall be punished in a writ of trespass. So here two trespasses are supposed, and but one found. As if one brings a writ *de parco fracto*, and if he will, he may aver moreover, *et damas suas cepit*, and he may be found guilty of one and not the other.—*Rede.* It certainly appears to me, that a fishing is implied when it is found that he took fish. As if I bring a writ of trespass against you for taking away my bond and cancelling it, and it is found that you cancelled it, this is good, without saying any thing about the taking it, for this is implied. *Quod fuit negatum* by all the justices. *Vavisor.* One man may fish, and another may take the fish; as if fish were taken by you, and another takes them from you; now he is guilty of taking the fish, but not of fishing in the water.—*Fineaux.* Though they are several trespasses, yet this is no reason why one may not be implied in the other, as has been said. If one assaults me I may have trespass against him.—*Brian, J.* I do not know that, unless he did some other act.—*Fineaux.* At least, if such writ should pass the Chancery, you might hold plea upon it, for an assault is a trespass.—***Vavisor.*** No such writ was ever seen, but as to your purpose you say well enough, that it is a different trespass from a battery.—For if the assault be found by verdict, although he be excused of the battery, yet shall he render damages.—*Fineaux.* Yet this does not prove any thing against this position, that, when a battery is found, an assault is implied. And I would take this difference.

A. D. 1496. Where an action is brought about such a thing as law intends a man may have on another's soil, a where not. As of a fishery, I may have it in anothe soil, though the land be in a stranger, and so o warren. And where an action is brought for fishing water, or hunting rabbits in a warren, the law tends that plaintiff has nothing more than the fishe or the warren there, and then he cannot take fish rabbits, except he fish in the fishery or hunt in warren.—*Brian, J.* Do not you see how a man n hunt in a park, and yet another have the deer *Vavisor* and *Townsend.* Yes, indeed, and so we th it is not good, and if a ven. fa. is bad in part it bad altogether.—*Davers.* I will absolve you of th for it is inserted at the end of the verdict, that, as the residue of the trespass, they are not guilty; th since it is found that they took the fish, if this be plied, then is the verdict good, and if it be not impli but if it be a separate trespass, then by these last wo of the verdict they are found not guilty. And thus verdict to this intent is good.—*Brian, J.* See if verdict is as you say. And then the record examined, and it was so. Then he said to Fisher. you have any other exception shew it to us. Then said, that it appeared by the verdict that they were fou guilty, as well of the turning up of the earth as of taking of the fish, and they assessed damages for break the close, and for taking the fish, and for the depastur at twenty marks, but they had assessed no damages turning up the earth; and if a jury find me guilty the trespass, and do not assess damages, their verdic void.—*Brian, J.* This indeed appears good mat Therefore make a motion in this matter to-morr and then judgment was given for plaintiff, and of error was brought, Hil. 17 of the King.

Year Book, 12 *Hen.* 7. *p.* 25. *A. D.* 1497. A. D. 1497.

Trespass was brought by the Duchess of Norfolk against several.—*Yaxley*, for some of the defendants, pleaded not guilty; and for the others he said, that the plaintiff on such a day and at such time, before the supposed trespass, licensed and granted to one G. O. Lord Suffolk, to enter into the said place, and there to hunt at his pleasure, by force of which the said defendants entered as his servants, and by the command of the said J. O. took the said deer, as they well might, which matter, &c.—*Keble*. This plea is not good, for three causes, one is, if it was a licence or a grant it would not be good, except it were in writing; the other is, that allowing it to be good, yet it extends only to him to whom the licence was given; the third is, that admitting the licence to be good, he could not take the deer. As to the first, every thing that passes by way of grant, and enures to the grantee as a freehold, cannot pass without deed. So here this is a freehold, since the licence extends to his hunting as often as he will, this shall extend for term of his life. For, if I grant a rent issuing out of my manor to a person, to receive it at his pleasure, this shall be a freehold; therefore, &c. And as to the second point, this licence extends but to him to whom it was given; for it is but a pleasure, which pleasure cannot be granted to another, no more than a grant, which only extends to the easement of the grantee. As if I grant to a man to go over my land to church, others shall not go by virtue of this licence. Or, if the licence be to enter my house, and to eat and drink with me for a certain time, no other can enter into my house by force of this licence. And, as to the third point, admitting the licence to be good, he cannot justify taking the deer, for the person who gave the licence had no property in it, but as a thing for his pleasure, which cannot enure to a stranger by way of gift, as by licence; for these causes the writ is not good.

Br. Ab. Licences, Graunts de un a auter outer subjects, pl. 10 S. C. and Trespass, 287. S. C.

A. D. 1497. *Yaxley e contra.* As to the first point, this is a good licence without deed, for I well know that in such things where a man shall have a freehold, and it is parcel of the land, or issuing out of the land, and which passes not by livery, one ought to have a deed.—*Resid.* 13 *H.* 7. 13.

A. D. 1498. Trespass. *Keilwey's Reports*, *p.* 50. 13 *H.* 7. *A. D.* 1498.

An action of trespass was brought for breaking a close, &c. The defendant said, that the place where the trespass is laid, is a place called B. adjoining one of the king's forests, called C.; and alledges that one C. is forester of the same forest, and alledges a prescription in him and his ancestors, and shews that the plaintiff, and all those whose property adjoined the forest were accustomed to fence on the side next the forest, and that for want of a proper fence four deer escaped out of the forest, in the very place where the defendant had supposed, &c.; and that the defendant, as servant to the said C., and by his command, pursued them and drove them back into the forest, which is the trespass complained of.

Rol. Ab. 564-5. —*Conisby.* The plea is not good; for, although the fault was the plaintiff's, in not fencing towards the forest, which was an injury done to the king, and for which the king might have punished him, still there is no reason why the defendant should do another injury to the plaintiff, notwithstanding that the plaintiff had committed a tort to the king by not fencing, &c.—*Fowcle* on the other side. It seems to me that the plea is good; for the fault lay in the plaintiff, that the beasts escaped at the very place where there was no fence, then it is reasonable that the forester should be at liberty to pursue and drive them back, for the plaintiff could not detain the beasts there, as it was owing to his fault that they came there; for, if the plaintiff had taken any wild beasts in the forest, the forester might have taken them from him, and for the reason, when they come into the

plaintiff's land through his own fault, as if the plaintiff should drive them into his own land without the forest, it would be lawful for the forester to pursue and retake them, and so in this case. And I see no difference between cattle and wild beasts; and if cattle had come into the plaintiff's land, owing to the defect of enclosure, it would have been lawful for the person interested in them to go after them and retake them.—*Keble* to the same effect. For a person has an interest in the beasts, in parks, and warrens, and because a man shall have an action, and recover for rabbits and fowls taken in his warren: and in rivers a person shall have an action of trespass for fishing there, and if he take any fish, the party to whom the water belongs may take them again, and still they are wild by nature; and so, although the beasts are wild, as long as they remain in the forest, the king has an interest in them; but, if they escape from thence he has no longer any property in them; and if the defendant had taken them in the forest, and had brought them to another place, the forester might well have retaken them. Then it is all the same where he had not fenced the place, if by this neglect they came into the plaintiff's land, whither the forester, or one by his command, might pursue them and retake them; for it is merely the plaintiff's fault that they come into his land. And it is, therefore, as strong in law as if the party himself had put them there; wherefore, &c. *Keble* also said, that no person could seize wild beasts in land adjoining the forest, when they had come out of the forest, (which *Mordant* denied,) unless the place were within the bounds of the forest.—*Wood.* The plea seems to me to be good, for the reason already stated, and the fault seems to have commenced with the plaintiff himself in not fencing, which gave the forester an authority to take them back out of his land. When a man has a park and wild beasts in it, and another break down the fence,

A. D. 1498.

4 Inst. 505.

A. D. 1498. so that the beasts escape out of the park into the land of the person by whom the fence was broken, it is lawful for the parker, or the owner of the park, to enter and retake the beasts; and so in this case, (which *Vavisor* affirmed,) since the fault lay in the plaintiff for not fencing; and it seems that, for the same reason, if they be tame cattle, and escape through the plaintiff's negligence, the owner may pursue and seize them.—*Davers contra.* For it is pleaded that the plaintiff was used to fence his land towards the forest, which does not prove how it was that the fence was not properly made; although the beasts escaped, still the forester could not pursue and retake them, for the fence might have been in his own land, in which case it is not lawful for the forester to pursue them before they come to the fence, for they would be in the plaintiff's land, nor any other man before he comes to the place where, &c. for any thing that is shewn on the part of the defendant by his plea, since it is not alledged that the fence joined the forest, and that there was no land between them, nor that the fence is made on the land belonging to the forest.—*Brian.* The plea is good as to that, for the plea is, that the fence is contiguous to the forest, and thus it is alledged that there is no ground between the plaintiff's land and the forest; for, if it had not been so alledged, the pleading would not have been good. But it seems to me, that, notwithstanding the fault is in the plaintiff, in not fencing, still it is not lawful for the forester, or any other man, to take them without the forest, for then the king has no property in them; neither the king nor the forester can meddle with them in another person's land. So, since the king has no property in them, the forester cannot enter to take them without the forest, for he has no property in them nor the king. Now, this is the present case; the pursuit of the defendant is a tortious act; for it is not like the case of

tame cattle, for the property remains, and the owner may take them, although the fault is in the plaintiff for not fencing. But it is otherwise with wild beasts—for, I understand, that if a person break down the paling of a park, so that the beasts escape, no pursuit can be made after them in the land of the person who broke down the paling, because the owner of the park ceases to have a property in them; but he has his remedy by action *de parco fracto* upon the statute in that case made, &c. A. D. 1498.

Year Book, 13 *Hen.* 7. *p.* 10. *A. D.* 1498.

Upon a writ of trespass on the Stat. *de Malefactoribus in parcis*, the defendant said, that plaintiff gave a buck to one B., and that he, as servant of the said B., came with him to the said park, and by his command assisted him to kill the said deer, by force of which he came and entered the said park, and chased the said deer, and killed it, on which chasing the plaintiff had founded this action. And the opinion of all the justices clearly was, that this was a good justification; for they said, if a man give to another a buck or doe, he has a right to bring his servants with him to take the said deer, otherwise he will be compelled to take the deer himself, which is unreasonable, therefore they thought the justification good.

Br. Ab. Trespass, pl. 431. S. C.

A licence to kill a deer, authorises the party to take servants with him.

Year Book, 13 *Hen.* 7. *p.* 12. *A. D.* 1498.

Edward Lord Suffolk brought a writ of trespass upon the Stat. *de Malefactoribus in parcis*, against Ralph Barney and R. Whitley, and supposed that the said Ralph and Richard, on the 26th day of July, in the 10th year of the now king, broke the parks of the said lord, at Huntingfield and Bemalle, and hunted in them without licence, and took and carried away wild beasts, (to wit), four bucks; and exception was taken to the count, because the hunting was supposed to be in two parks,

A. D. 1493. which ought to have a several punishment; that is, for each park three years imprisonment, as is given by Westminster the 1st, and because they joined together the hunting of three, it is not good; for one cannot have a writ of ravishment of two wards, nor a *quare impedit* of two churches. Yet by the justices it was held good, as well as in trespass, for one may join lands of twenty titles in trespass, and trespass in woods and pastures, and things of this nature, and this action is but trespass. And then the defendant said for R. B. that as to the hunting, entering, and carrying away, the said lord, before the trespass, enfeoffed the Archbishop of Canterbury and others, of the said parks, and that they as their servants, and by their command, entered into the said parks, and hunted and carried away, as was lawful for them to do. And exception was taken to the plea, because they had given no colour of title to the plaintiff. But it was awarded good, because he had conveyed the interest of plaintiff himself. Then plaintiff said, That since the said feoffment, and before the trespass, the Archbishop of Canterbury, and others, had leased to him to hold at will, by force of which he entered, and was possessed until, &c.; without this, that the said archbishop and others had commanded the defendants, &c.—*Keble* said, This command is not traversable; for, in this case, it is not material, for he hath well confessed and avoided the bar, although he had conveyed his interest before the trespass, for then the command of the lessors were ineffectual, except to determine their will. As if the said lord would have pleaded a lease for a term of years, before the trespass, by the archbishop, and others, then the command would not be traversed: for the command then is not denied; but, notwithstanding, such command is void. But where the command is the effect of the bar, there it is traversable, as where one justifies a trespass under a command, there the command

is traversable. But *the Justices* were clearly of opinion that it was traversable in the case at bar, since there is an interest of the same persons, commencing by the lease at will; and they agreed in the case of the lease for term of years, for this is a clear avoidance of the command: but, in a lease at will, the lessor, by his command, avoids the lease, and therefore it is traversable, for the command determines the lease at will.—*R. Whitley* pleaded, That as to the trespass in one park, that the said Lord Suffolk, on such a day, and at such a place, delivered a warrant sealed with his seal, to one Robert Southwell, directed to one T., his keeper of his said park, commanding him to deliver a buck to the said R. S.; by force of which the said R. S. at the time of the trespass, and the said Whitley, as his servant, entered with him into the said park, and the said R. S. delivered the said warrant to the said keeper; and the said R. S. and Whitley required the keeper to hunt; he did so, and killed a buck, and the said Whitley carried this away, as he well might. And divers exceptions were taken to the plea. One was, because the servant justified his entry into the park with his master, to whom no authority is given, but only to him who had the warrant. And it was held clearly by all the justices, that because the master had good cause of entry, his servant was justified in entering with him, for he cannot go alone. So also exception was taken that nothing was confessed by them. But it was held a good confession for the request made to the keeper to hunt, was to hunt for them; for, if this was without authority, they shall be punished as in a trespass or false imprisonment; it is a good justification to say, that he delivered a warrant to the sheriff to arrest a man, by force of which he arrested him; this is a confession of a lawful imprisonment; so his request, by authority of the warrant to hunt in that manner, and if it was without authority, he did wrong; for, the commanders of a trespass are as A. D. 1498.

A. D. 1498. much trespassers as the real trespasser, and on this account it was held good. Another exception was taken, because the said W. said that he had carried away the deer, without saying by whose command. But this was held good, for it was shewn before that he was his servant, which shall always afterwards be intended; and then the defendants pleaded licence from the demandant to the Duchess of Norfolk, to hunt and send her servants to take a deer when she would, and the said duchess sent the defendants for a deer, &c.: and the demandant said that they did it of their own wrong, and without such cause.

Year Book, 13 *Hen.* 7. *p.* 13. *A. D.* 1498.

Bro. Ab. Trespass, 434. S. C.

The Duchess of Norfolk brought an action for hunting in her park at Lopham, in the county of Norfolk, against Wiseman and others. They said that the duchess had given leave to Lord Suffolk to hunt in the said park for his pleasure, and they shewed that at the time of the trespass the said lord came into the said park to hunt, and the defendants came with him, &c. And it was alledged that this plea was not good; for, as to the licence given to the said lord, it is but for his pleasure, and extends only to himself, and no other person is justified by this licence. For, if I give a man licence to eat with me, none of his servants are justified in entering into my house by reason of this licence, for it is a licence for his pleasure. So, if I give a man a licence to go into my orchard for his pleasure, none of his servants are justified by this licence, but, if it were for his profit it would be otherwise; for, if a man gives me a licence to drive my cart over his land, by this leave my servants are justified. And so, if one gives me leave to have a tree in his wood, my servants are justified in cutting the tree, and in entering, for I shall have profit by this; and of this opinion was the court. And then the defendants

said, that the duchess had given leave to the earl to hunt, kill, and take away with him the deer for his pleasure, and then said that the earl came there, and they came with him, and by his command hunted, and carried away, &c. And this was held good; and the licence was alledged to be in Suffolk. And the duchess rejoined, that they did it of their own wrong, without such cause. Then it was held that the jury should come from both counties, (to wit, Norfolk and Suffolk). And then it was suggested that the duchess was lady of the hundred of Gilcrosse, in which Lopham is, and that there were not sufficient in the said hundred, except those who were under the influence of the said duchess; and they prayed a *ven. fa.* to the hundred next adjoining; and it was granted by the justices.—*Quod nota.* A. D. 1498

Year Book, 13 *Hen.* 7. *p.* 16. *A. D.* 1498.

Ta. Darel sued out a writ of trespass against Yates and others, for breaking and entering his close, and cutting his wood. The defendant said, that the king is seised of a forest, called Whitewood, adjoining the place where the trespass is supposed to be committed: and says also, that one T. Green, knight, is warden of the same forest, and that he and all his ancestors from time, &c. were used in this place, wherein the trespass is supposed, and also in other lands of the plaintiff, to chase the wild beasts that are there, with their dogs, and to chase them back, even to the forest; and says, that four deer went out of the forest aforesaid, up to the place wherein, &c., and the defendant, as servant of the said Sir T. Green, &c., entered into the said land, and with his dogs chased the deer out of the land aforesaid, up to the king's forest, &c. And as to the cutting of the wood, not guilty.—*Mordant.* It seems that the plea is not good; for a man ought not to justify his entry into the close of another, unless he derived some effect Br. Ab. Prescription, pl. 107. S. C.

A. D. 1498. or profit from his entry, which the defendant could not have in this case; for, when the wild beasts went out of the forest into the land of the plaintiff, then the king had no interest in the wild beasts, but the interest in them is in the tenant of the soil, and if any stranger kills them in the soil of the tenant, he shall have his action of trespass, and shall recover his damages, having regard to the loss he sustained in the chasing and killing the beasts. And for that reason, before the Statute of Westminster the 1st, the tenant of the land would have recovered damages in such a case, although the property were in no one. And also, if a person should prescribe to enter my close, and chase my beasts out of my close, this prescription is invalid, for he has no interest or profit by his entry; and if a person should prescribe to enter my close, the prescription is invalid, so also is it in this case.—*Keble* on the other side. One may prescribe for any thing which can legally commence by grant, and a man may grant to another and his heirs to hunt in his soil at their pleasure, and so may the ancestor of the plaintiff make such grant to the ancestor of the defendant.—*Mordant*. Our case is different, for he has justified hunting wild beasts of the king in the soil of the plaintiff, and not hunting wild beasts of the plaintiff in his soil.—*Frowike*. By common right, neither the warden of the forest, nor his servants, can justify hunting wild beasts that come out of the forest into the land of a stranger, without title by prescription, for the king loses his interest in them when they enter another's land, and this case is not like that of my beasts escaping into another's soil, for there I may follow them of common right, and retake them without any prescription; and, as has been said, this title by prescription may commence by grant, for I may grant to the warden leave to hunt there; and he denied the case which Mordant had put, where one prescribes to enter my close to hunt my

beasts, he said that the prescription was good.—*Quod Brian et Vavisor concesserunt.* A. D. 1498.

Year Book, 15 *Hen.* 7. *p.* 16. *A. D.* 1500. A. D. 1500.

If one be convicted of hunting in a warren, he shall pay a greater fine than for a mere trespass.—*Quod nota.*

Kickwey's Rep. 19 *Hen.* 7. *A. D.* 1504. A. D. 1504.

In trespass, "wherefore he fished in the several fishery" of the plaintiff, the defendant says, that the place where, &c. was an acre of land covered with water, which was his freehold, &c.—*Frowike.* The plea seems to me to be bad; for a several fishery is a special liberty which another man may probably have in my land; and it resembles a warren, which is a distinct thing from the land; and because, as it appears to me, the proper action for the tenant of the soil is "Wherefore with force and arms he entered and broke into his pond;" and this was the better opinion of the court. *Tamen quære*, for it was adjourned. And yet, in the king's-bench, in the eighth year of *Hen.* 8. all the judges were clearly of opinion, that the plea in the case of "a several fishery," was good, and obliged the plaintiff to reply, &c. And it seems 35 *H.* 6. That a joint-tenancy on the part of the plaintiff in the soil, is no plea in the case of a warren.

Semble. In trespass, for entering a several fishery, liberum tenementum is a good plea. Semble. That joint-tenancy with the plaintiff in the soil, is no plea to trespass for entering a warren.

20 H. 6. 4
10 H. 7. 26. b.

Year Book, 21 *Hen.* 7. *p.* 13. *A. D.* 1506. A. D. 1506.

Fineux said, If one gives me licence to hunt in his park, it is lawful for me to have my servants with me, and I shall be excused by this licence, as well as my servants, and this was adjudged in the Duchess of Norfolk and Edmund de la Pole. And he said also, that if licence was given to a mean man to hunt in a park, he cannot bring more persons with him than are necessary to attend upon him.—*Yaxley* was of a contrary opinion. —*Ideo quære.*

Br. Ab. Trespass, pl. 207. S. C.

A. D. 1506.

Year Book, 21 *H.* 7. *p.* 21. *A. D.* 1506.

Trespass for entering a forest cannot be supported on Statute de Malefactoribus in parcis.

Trespass de Malefactoribus in parcis. It was counted that defendant entered into a certain forest. And the opinion of the court was, that this action lay not, except for misfeazance in parks, for the Statute of Westminster, c. 20. is only "*in parks*," and this shall be taken strictly, for the punishment for misfeazance in forests, is to be inflicted according to *Charta de Foresta*, and in no other manner.

Year Book, 21 *Hen.* 7. *p.* 30. *A. D.* 1506.

Bro. Ab. Forest, Park, and Chase, pl. 9. and Tit. Action sur Stat. p. 16. S. C.

Indictment for killing a hart proclaimed, was found before the justices of peace, and the indictment was challenged, because it was not laid in the indictment in what place proclamation was made, and so it was not alledged in what place he had killed it; for if it were killed out of the bounds of the forest, it was lawful for him to kill it. And it was said by *Fineaux*, That he might plead this matter to the jurisdiction of the court, because the justices of the forest should determine this matter.

Bro. Ab. Tit. Prescription, pl. 108.

Libra Whorwood, That a man may prescribe that he and his ancestors from time immemorial, and they whose estate he hath in the manor of C. have had park there as appendant from time immemorial; and this is a good claim.

Bro. Ab. Tit. Trespass, pl. 407.

Year Book, 12 Hen. 8. 3. S. C.

In trespass, for taking a hound, the defendant demurs in law, and the plaintiff recovers six shillings and eightpence for costs and damages; for, notwithstanding the hound is a beast for pleasure, and *feræ naturæ*, and for which a man does not pay tithes, and an appeal of felony does not lie, therefore, neither an action of detinue, yet if a man takes it or kills it, trespass lies, for, inasmuch

as it is tamed, the master has property in it, and it may be pleasure or profit to the owner, as to guard his house, or to kill rats or vermin, which observe; and the law is the same of hawks, popinjays, thrushes, apes, and which are tamed; and see in the same place for *damnum absque injuriâ*, and for torts not punishable. A. D. 1506.

Year Book, 12 *Hen.* 8. *p.* 9. *A. D.* 1521. A. D. 1521.

One C. brought a writ of trespass against one M. wherefore he broke his close, and took and carried away one dead stag. And M. said that he was the forester of the queen of the forest of the free chace of B. and that the plaintiff on such a day came into the said forest, and chased a hart out of the forest, and that he, as forester, made fresh suit after it, and the hart was killed in the land of the plaintiff before the forester came there; and the forester there seized the said stag for the queen; and this is the trespass complained of.—*Roo.* It seems this could not be so; for when it was out of the forest, it was out of her possession, and then, *fuit nullius in rebus; quia fera vagans est nullius in rebus;* and then, although he did make fresh pursuit after it, yet when it is dead the property is changed, and he could not seize it. For, if I have a warren, and the rabbits escape out of my warren, and a stranger kills them, and I see them, yet I cannot seize them, for being once out of my possession the property is changed, and then it is not lawful for me to seize them; so here. *Carell and Newdigat* on the same side; *Newport and Brook* on the other. If the property be so changed that I cannot know it, as a cup melted, or silver, then it is not lawful for me to seize them; but here, this was his hart, and he had the possession, and when any person chooses it, and he makes fresh pursuit, he is not yet out of possession, because of this fresh pursuit; and then, although it be dead, yet he may well know it by its skin or its horns, and may

A. D. 1591. lawfully seize it. As if one take my cloth and make a garment of it, I may know my cloth and lawfully seize it; so here. *Brook, J.* First we must see how he seized, when he did nothing but lay his hands upon it; then he cannot say "*cepit et abduxit*," for he did nothing, but only "*seisivit.*" And if I wish to seize a horse, this is not sufficient to maintain a writ of trespass against me; because he should have laid how I had seized it. Then, as to the matter, we must see of what nature these beasts are, that are called *feræ naturæ*; for it is their property to be wild, and they belong to no one, as was before said, any one has possession of them, but when any one by his industry and labour hath made them tame, then they are his chattels, for then they are in his possession as rabbits, fish, and other things, and then it is not lawful for any one to take them out of his possession. For, if I have a deer in my house or garden, it is not lawful for any one to take it; so, if he kill it in my land, I shall have the body, because it is mine, and in my possession; then, when it is in my forest or park I have keepers to attend it, then it is always in my possession, and it is not lawful for any one to take it out of possession; therefore, when the plaintiff chased it out of the forest, he did not by this act gain any possession, because it was my hart, and in my possession, for my keeper attends it, and by this killing it in his land he shall gain no property; for, if I let my falcon fly in my own land at a pheasant, and it kills the pheasant in your land, you gain no property in the pheasant, but I may take it, and shall only be punished for entering into your land; for this happened by my industry and labour, and when my falcon had it, it was in my possession. But it is said, that if I come into your land, and kill a fox, a gray, or an otter, for this entry I shall not be punished, because they are beasts against the common profit; then at common law, and before

the statute, a man would be punished for hunting, as in trespass, but no penalty was assessed, and then the statute was made concerning hunters. As, if an infant or man serves me without hire, if any one takes him against his will, I shall have an action of trespass, yet it is at his pleasure whether he will remain with me or not; but, if he were my servant hired by the year, then I should have an action upon the statute. So here the plaintiff has chased this hart, and, on account of this chasing, he should be punished, but he hath gained no possession on this account; but if the hart had been wild, and out of the forest, then he might have taken it; but, because it was in the custody and possession of the keeper, and the plaintiff by his chasing gained no property but what commenced by wrong, then it was lawful for the forester to take it, and this action cannot be maintained.—*Pollard.* I think this seizing sufficient; for, if a man takes my horse, and I find him with him afterwards, and seize him by this word *(seisin)* this is good; so I may command my servant to seize any thing that is forfeited to me; and as to the matter, we must see what interest he who is possessed of a park or a forest has in the beasts; and it seems that he has more interest in the stags than him that has no park; for no one can have a park without licence from the king. For, if one has stags in an enclosed ground, and a stranger hunts them, he has no remedy for this hunting, but an action of *quare clausum fregit*, and there it appears he has not possession of them; but he who has a park may appoint a forester, and this forester may do many things, as kill, hunt, and in this he is justified; and if any one would hunt in such a park, he may be punished by the Stat. of Hunters, and then he has more interest in the stags than one that has no park; then, as to the chasing this hart out of the forest, he has done wrong, and it i not reasonable that a man should profit by his own wrong, A. D. 1521.

A. D. 1521. As if there be lord and tenant, and the tenant quit, and the lord can find no sufficient distress upon the land, and he chases the beasts from a field, being in the lands held of another lord, into his own lands, he shall take no advantage of this. So, if a disseisor enfeoff his father, and the father die seised, he shall have no advantage of this descent; so in this case, since the wrong commenced in himself, he shall have no advantage of it; but when he had chased it out of the forest, if a stranger who knew nothing of this wrong had chased and killed it, it would have been lawful for him to have taken it, because it is *feræ naturæ*, and he found it at large; and then the keeper could not seize it; but, in this case, he who has a forest or park, has a great liberty of pursuit, if a hart be wounded in the park or forest, and although it get out, yet because this wounding commenced in the park, he may follow it and seize it afterwards, although it be dead. — *Eliot.* I think he could not say "*seisivit*," for the seizing is nothing but a notice that such a thing belonged to him; for if I have a lease made to me, or one gives me goods, I cannot say by force of this I was seised, but I was possessed, or that I have taken them, but not seized. Then as to the matter, it appears that the forester might legally take the hart. And first it appears that these beasts, which are *feræ naturæ*, belong to him in whose possession they are, but if they are at large, then *capiat qui capere possit*. But if they are once in my possession, it is not lawful for any one to take them out of it. As, if my horse strays and comes into your land, it belongs to you as long as it remains there, but if you will not take it as a stray, and it gets into another's land, you cannot then take it, for it is out of your possession, and if any one takes it as a stray, he hath right against every one but me, and if any one take it out of his possession, he shall have an action against him for the taking. So in this case, when this

hart was in the forest, it was in the possession of the forester, and it was not lawful for any one to take it. Then, when plaintiff had chased it out of the forest, he did wrong, and I may legally retake it, for he has taken a thing out of my possession, and then when I make a fresh suit I may know it, and it is lawful for me to take it. And I cannot agree in what my *Brother Pollard* hath said, That if a stranger comes and finds it out of the forest, that he may kill it, and I cannot retake it; this cannot be so, for he appears to me to be a co-adjutor in the wrong, and the thing which was tortious in its commencement cannot be legal afterwards but in certain cases; for, if a thief carry off my horse, whether I make fresh suit or not, if he sells or delivers it to another, unless it be in a fair or market overt, I may legally retake it, for the tort done to me still remains. Then this matter shall not alter the property, for because he had never possession but by wrong, any act of his cannot make it lawful; for, if a person takes my horse and kills it, I may seize it, or if he takes my ox and sells it to a butcher, who kills it, if it was not in market overt, then may I lawfully seize it, for though it be dead, and hath lost its name, (for *bos mortuus non est bos*,) yet it is the same thing that was taken out of my possession, and I may legally retake it.—*Brudnel.* Where a man has a possession or a right, there he may legally say *seisivit;* as if a thief takes my goods and fly, and I make fresh suit, and the sheriff takes them before I come, yet may I seize them in the hands of the sheriff; so may I seize my villain, for I had a right to him before. So if my horse stray, and a stranger take him as baillee, I may legally seize him. So in all cases where I had a right of possession before, this word *(seisivit)* is a sufficient indication of a taking by me. As to the beasts, it appears to me that the property in those which are *feræ naturæ*, is in no one; for if a

A. D. 1521.

A. D. 1521. person have a warren with rabbits or pheasants, and a stranger takes them, he cannot say, *quare warrennam suam fregit et cuniculos aut phasianos suos cepit, &c.* for a man may have a right in a thing, and yet no property; as a common well in a town, or the stocks, or pillory, or a common highway in a town, every one in the town has a right to them, but no property in them. *Quære*, for *Brook* said, The property in them is in the lord of the town. So a man may have possession but not property in those things which are *feræ naturæ*; or, if a pheasant or hawk make its nest in your land, and has young pheasants, all this time they belong to you, for they are in your possession, but when they come to maturity, and fly into another's land, the possession of them is then in the tenant of the land. So of fish which come down with the water, when the water is running through your land, you may lawfully take the fish, but when it comes into my land, then I may take them, and no one else, for then the possession of them is in me. So of stags, where parks adjoin. But in this case the hart was once in my possession, and then it was not lawful for any one to chase it, or take it out of my possession, but if it had strayed out of its own accord, then any one might have taken it, but when he had chased it out of the forest into his own land, this being by the act of the party, he could not take it as if it were wild, but he took it tortiously, and then it is not reasonable that he should take advantage of his own wrong, but I may seize it; for, if I have a fishery adjoining to your's, and the water runs from mine into your's by a sluice, if my fish come into your fishery with the water, I cannot retake them; but if you would break the sluice, and make them come into your fishery, then I may retake them. So, if my park adjoins your's, and my stags come into your park, I cannot retake them, but if you break my pales, and chase them out of my park, then I may re-

take them. So, if two warrens, or two dove-cotes adjoining, or any thing containing *feræ naturæ*, and, although it be dead, yet the property is not so changed but I may know it; but, if it be roasted or baked, then I cannot seize it, because I have lost the means of knowing it, as if one take my silver cup or gold chain, and melt them, I cannot seize them, because I cannot know them; and, therefore, in this case, he ought to have put in his writ, "*quare carnes crudes, cepit, &c.*" and not "*quare cervum mortuum cepit et asportavit, quia cervus mortuus non cervus, sed est quoddam mortuum et caro; sicut homo mortuus non est homo.*" But in this case the plaintiff hath declared for the taking of a hart, and the other justifies the taking of the said hart, and as it appears this was the same thing, and that he had a knowledge of it, and then the property was not gone, and therefore he might legally take it; and it was adjudged that plaintiff do take nothing by his writ. A. D. 1521.

Year Book, 13 *Hen.* 8. *p.* 15. *A. D.* 1522. A. D. 1522.

Inglefield le puisne, said, That a man having common of fishery in another's land, cannot cut the grass growing on the bank.

Year Book, 14 *Hen.* 8. *p.* 1. *A. D.* 1523. A. D. 1523.

Pollard, J. said, If I have a wier I shall not only have the wier but the fish; and if I let this wier, the lessee shall have all the profits.—*Brudnel, J.* said, Of those things and profits which arise *ratione fundi*, as rabbits, partridges, and mines, if they be not excepted, the lessee shall have them; but if the lessor reserves to himself a pond, he shall have the fish and all the birds on the river, because it is the *causâ sine qua non*; so, if he except a wier he shall have the fish, for the wier is nothing but stakes and such things; for if I lease my manor, reserving a warren, I shall have the rabbits, and yet the warren is but a liberty, and if he excepts this he

A. D. 1525. may legally come to take it, for the law gives him the means of coming at these things.

A. D. 1527. *Jenkins, 5 Century, p. 201. 18 Hen. 8. A. D. 1527.*

The stealing of tame peacocks is felony, so of tame pigeons, and young hawks in their nests; so of fishes in a private lake, and ponds: it is otherwise of the pheasant, partridge, hare, and coney, although they be so kept that they cannot escape; if they do not become reclaimed, and be known so to be, by him who steals them.

The same law of all wild beasts which serve for man's food: but as to cats, dogs, monkeys, and the like, it is no felony to *steal them;* but trespass may lie for taking them.

A. D. 1528. *Year Book, 19 Hen. 8. p. 2. A. D. 1528.*

A question was proposed to all the justices by the Chancellor, Whether if a man feloniously take peacocks which are tame and domestic, it be felony or not. And *per Fitzherbert* and *Inglefield*, it was said, that it was not felony, because they are *feræ naturæ*, as doves in a dove-cote, and if the young of the said doves are stolen it is no felony. The law is the same with regard to herons taken out of a nest, or swans taken, or a buck or hind which are domestic, or of hares taken out of a garden surrounded by a wall. So of a mastiff, hound, or spaniel; or of a tamed goshawk, for they are properly things rather of pleasure than of profit. And so of a peacock, which is a bird rather of pleasure than of profit, for often men wish to lose all the young ones but one. Fitzjames and the other justices said, that peacocks are commonly of the nature of hens or capons, geese or ducks, and in them the owner has a property, and they have the *animum revertandi*, and are not fowls of warren, as pheasants, partridges, rabbits, and such things, for taking them with a felonious intent is not felony. And at last it

was agreed by all the justices that this taking peacocks was felony, for the cause aforesaid. *Quod nota.* A. D. 1528.

Benloe and Dalison, p. 20. 28 *Hen.* 8. *A. D.* 1537. A. D. 1537.

Note, That if the warden of my park, or any of his servants, of their own accord, and without my assent, command, or agreement, kill any wild beast in my park which is under their ward, or if they throw down or rase any house in my park, for instance, a barn to put hay in for the deer, or any other house; or if he or they cut any tree or trees, or underwood, or woods growing in the said park, and give or sell the said tree, or woods to another, &c.; in all these cases he who is warden shall lose his office of wardenship. And so was the law held to be before *Sergts. Hinde and Hales, the King's Attorney, Justices of Assize in Essex*, in the same year between the bishop of London, plaintiff, and one Heron defendant, who was warden of Crondon Park. And in the evidence upon the trial at Ni. Pri. of the said matter, it was agreed by the same justices, that the warden of a park had no estate in law, in possession of the said park, nor of the lodge there, but the possession of them is always in the owner of the soil of the said park. And the warden has nothing but the occupation, and keeping and surveying of them; and the warden cannot justify holding the said lodge or park with force, in a writ of entry upon the Stat. of 8 Hen. 8, &c. brought by the said owner against him, upon an entry made, &c. the same would be a cause of forfeiture, if the said warden had been warden there, and occupied this for three years, &c.; but a warden of a park of inheritance cannot, by such means, forfeit his said office as was agreed. *Et vid.* anno 1. 5 Ed. 4. 26. 15 Ed. 4. 3. b. per Brian, 2 H. 7. 8. 4 Leon. 120. 1 And. 29. S. C. 1 Inst. 233. b. 2 Hen. 7. 8. acc. Mo. 10. 8 Hen. 6. c. 9. T. 28. H. 8.

A. D. 1537.

Dyer's Reports, p. 30. case 209.

A lawday or warren in a manor doth not pass by a feoffment of the manor without cum pertinentiis. Bendl. 20. 1 And. 26. 58. Moor, 427. Fitz Avowry, 211, 213. 11. Co. 8. b. 7. Co. 23. b. 8 H. 7 5. a. 32 H 6. 21. b. 42 E. 3. 4. a. 13. a. 3 H. 6. 13. b. 35 H. 6. 55. b. 14 H. 4. 6. a. Bro. Warren. 7. Davis, 5. b. 11. Co. 13. b. Poph. 169. Vin. Ab. Extinguishment, c.

There* are three co-parceners of a manor, and the king grants to them a lawday, and they make a feoffment of the manor; notwithstanding this, they shall have the lawday. So is the law also, if a man have a manor, and the king grant to me a warren within the said manor, if I afterward enfeoff the king of the manor, without the appurtenances, I shall have the warren. And also a man may have a warren or lawday in other lands, *per totam curiam.*

* T. 23 Eliz. A. has warren in his lands, and lets the lands to B. rendering rent; B kills the coneys, and A. brings trespass *quare vi et armis*, for the warren does not pass by the lease.

Benloe, [11. pl. 45.] 28 Hen. 8. Three co-parceners seised of a manor whereto a leet belongs, and the king purchase two parts of the manor; yet the leet, by such purchase, is not extinguished, but remains appendant to the third part of the manor.

There is a difference between a warren used to a manor from time immemorial, and a warren appendant; for, in the first case, it shall not pass by a grant of the manor *cum pertinentiis*, for it is not parcel; in the other, it shall pass, but not without these words, *cum pertinentiis*, 8 H. 7. 4. b. 5. a.

A. D. 1550.

Moore's Reports, 3 Edw. 6. A. D. 1550.

If my park-keeper will not serve a warrant that I have given him, nor suffer it to be served, this a forfeiture of his office, per *Hales*, *Brown*, and *Montague* contra, and said, this is merely a disobedience, and not a forfeiture. So, if he would not suffer his master to hunt there, it is only a disobedience, and a misfeazance, which does not amount to a forfeiture. It is otherwise in the case of a nonfeazance, for that is a forfeiture; and the cutting of trees is a forfeiture of his office. Vide Postea Num. 36.

Moore's Reports, p. 9. 3 Edw. 6. A. D. 1550.

The office of park-keeper was granted by deed to a man for term of his life; and afterwards the owner of the park gave a warrant to the park-keeper to be served,

and he would not serve the warrant, nor suffer it to be served.—*Morgan* moved the court if this was not a forfeiture of his office.—*Hales*. It appears to me that this is a forfeiture of his office, for a condition in law is annexed to the grant, (to wit,) that he will execute his office, or otherwise forfeit it, so that the grantor may enter, and it is a part of the office to serve the warrants, or to permit them to be served. And if I grant the stewardship of my manor of D. to two courts, on two certain days, if the grantee does not hold the two courts, he forfeits the stewardship, and the confidence which one man reposes in another, and the will of a man which he desires to be performed, are matters of the highest importance of any which concern man. And here the keeper is the servant, and under the obedience of his master, and he ought to do that which is lawful to be done for his master in the park. Wherefore in as much as he has not served the warrants, nor obeyed the commands of his master, he has forfeited his office. And if a man retains a servant for a year, and commands him to transact his business, and he refuses, and afterwards brings his action of debt for his salary, is it not a good plea for the master to say, that he required him to do his business, and he refused? certainly it is; and so here, he has the custody of the park, on a condition in law, which he has not performed; wherefore, &c.—*Brown* was of the same opinion.—*Montague*, *contra*, said, This refusal of the servant to serve his master's warrant is no forfeiture, but merely a disobedience, and no cause of forfeiture. And there is a difference between the nonfeazance and the misfeazance of a thing. And he conceived that the nonfeazance of a thing was a forfeiture, but not the misfeazance; and this refusal is not a misfeazance but a disobedience only, and not a forfeiture. And he agreed that the cutting of trees in a park was a forfeiture of the office of park-keeper. A. D. 1550.

A. D. 1553.

3 Leon. 1. 6 *Edw.* 6. *A. D.* 1553.

A man had a warren in fee, extending into three towns, and leased the same by deed to another, rendering rent; and afterwards granted by deed the reversion of the whole warren, in one of the said towns to another and the lessee attorned. It was holden by all the justices in the Common Pleas, That neither the grantor nor the grantee should have any part of the rent during the same term, because no such contract can be apportioned

Benlow, 12. Owen, 10. 1 And. 26. 13 Co. 57. 1 Inst. 148.a. 7 Co. 28. b. Godb. 44.

Jenkins's Fifth Century, case 63. *p.* 218.

The King grants the forest of Waybridge and Sapel in the county of Huntingdon, to A. for sixty years. A. covenants with the king to maintain 100 deer there during the said term, and at the end thereof to leave the forest so stocked to the king: the king grants the keeping of the forest to B.; B. during the term, cannot kill nor give a warrant for any deer there. By all the judges of England. For the forest was granted for sixty years, and the game passed by the grant of the forest; and the said covenant does not controul the grant: and if B. might have such liberty, he might disable A. from performing his said covenant. Speed, in his description of this county of Huntingdon, has a good discourse of the forest in this county: anciently it was all a forest, and called Hunter's Down. The honour of Pickering has a forest appendant to it: a patent granted by the king of the honour *cum pertinentiis* passes the forest, and the grant of the forest passes the game.

1 El. Dyer, 169. Patents, Forest. Palm. 88. 2 Buls. 290.

26 Ass. pl. 60.

A. D. 1559.

The king grants a forest for years to A. who covenants to keep one hundred deer there, and to leave one

2 Dyer's Reps. 169. b. *Sir Richard Cromwell's C*

King Henry 8. by letters patent dated in the 33d of his reign, of his own certain knowledge and motion gave, granted, and to farm, delivered to Ric Cromwell, Knight, the forests of Waybridge and ley, in the county of Huntingdon, habendum to with all its parts, members, parcels, and appurtena

for the term of eighty years, paying six pounds thirteen shillings and fourpence by the year, &c. with this clause, *s.* "and the aforesaid R. C. his executors, and assigns, shall keep, have, and maintain in the forests aforesaid, from time to time during the term aforesaid, one hundred deer, and the same, or others like them in number, in the said forests at the end of the term aforesaid shall leave to the said king, his heirs, and successors," without any other reservation of the game. And now Lord North, who had the fee-simple, would have taken of the game, or given a warrant there: and as it seemed to the greater part of the judges and serjeants of both houses, and to the attorney-general, he cannot, for all the game was included in the word and name of forest; and the one hundred deer are not reserved to be killed, or any of them, for then it would not be possible for the lessee to perform his covenant abovementioned, but it is reserved only for the maintenance of the game and forest.

A. D. 1559.

hundred at the end of the term. A grantee in fee cannot kill or give warrant for any deer there during the term.

By the grant of a forest the game passes.

Jenk. Cent. 5. c. 63. S. C. Palm. 88. 2 Bulst. 290. 4 Inst. 314.

Lord Shandois against Wye and others. Dyer's Reports, 238. a.

A. D. 1563.

Trespass brought upon the Statute West. 2. c. 28. [1. c. 20.] *de Malefactoribus in parcis et vivariis* * by the Lord Shandois against Wye and others, for the taking of one sorel and ten rascals: and by *nisi prius* the defendants were found guilty: and now the plaintiff prayed judgment, and it appeared to the court that what concerns the queen, *s.* the ransom, the finding surety that they should not trespass any more, and the abjuring the realm for non-ability of payment of it, is pardoned by the general pardon in the 5th year. And then judgment is to be given for the damages, and imprisonment of three years. And *quære*, whether there shall be finding of surety that he will not trespass any

The action on West. 1. c. 20. must be to answer as well the king as the plaintiff. And in the writ there must be a double recital of finding surety.

Whether the bond not to trespass any more does not extend to all parks; and, Whether it must be

* How the law has been altered with respect to these offences in parks and ponds, see Hawk. P. C. B. 1. c. 49. and Appendix 3. to cap. 58

A. D. 1565. more, &c. and for the other *sit inde quietus*. And *quære*, whether this bond, that he will not trespass any more, does not extend to all parks within the realm. And *quære* also, whether the bond shall be made to the queen or to the party plaintiff. But note, that all the precedents of this action are to answer as well to our lord the king as to the party plaintiff: and also double recital of the finding of surety according to the words of the statute whereof I have seen several precedents. And because these defaults were perceived in this action brought by Lord Shandois in his own name, and the surety only once recited in the writ, *ideo Curia advisare vult*, until next Michaelmas Term. And see a good precedent, Hil. 21. H. 7. Rot. 26. in B. R. that the defendant, a prisoner in the Marshalsea, upon the judgment in this action, after the three years was compelled to find sureties of London and Southwark, whereof two were gentlemen and yeomen, by recognizance, each surety in ten pounds, and the defendant himself in forty pounds to the king, that he should no more commit trespass in any parks and ponds against the form of the statute, &c. And the plaintiff acknowledged himself satisfied of the damages, and the defendant went quit. And note that no precedent in C. B. can be found in this case, but see Trin. 13 H. 8. Rot. 480. and 5 H. 5. 1.

made to the king or the plaintiff? *Quære*, Mo. 58. [Dal. 60.] S. C. [16. Vin. Ab. 186, 187.] [2 Hawk. P. C. 555.] 1 H. 5. 1. 30 E. 3. 11. 47 E. 3. 10. Lib. Intr. 58. b. 2. Inst. 200. [F.N.B. 154. 1. Com. Dig. 129. 230.] Br. Action Popula. 5 Dy. 15. 2 Inst. 201.

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2 Dyer's Reports, 240. b.

A. D. 1565. It was resolved by the greater part of the judges and queen's counsel this term at Serjeant's Inn, in the presence of the Earl of Sussex, justice of the forests this side Trent, that the building of a new house in

Building on a man's own waste within a forest is a purpresture, but the jus-

Atkins, in his reading upon the Statute of Forests in Lincoln's I August 1632, held, that the erection of a beacon on one's own land i forest is a purpresture; and he cited one Bosbye's case, which was at last eyre at Waltham. A sum of money was devised by Bosbye to erec causeway in the said forest, which was done accordingly by his son, and he fined for a purpresture. A man in a forest cannot cut down wood on his o land without view of the forester, [Fitz. Ab. tit. Trespass, 239.] Br. Fores but he may do it by prescription. Co. Lit. 115. [a. and Mr. Harg. note 15 fol. 118. a.]

several soil or waste of any man within a forest is a purpresture and nuisance to the forest and the game, and finable, or must pay a rent for the toleration or permission for it to stand, at the judgment and discretion of the justice, or is razeable, and to be destroyed at pleasure, &c.

A. D. 1565. tice of the forest may suffer it to stand, and inpose a rent on it. Jenk. Cent. 5. c. 100. S. C. 3 Inst. 204. [W. Jones, 277.]

Jenkins's Fifth Century, p. 230. case 100.

A. has land in a forest, he cannot build an house there without the licence of the king, or of the justice in eire: if he does, it is a purpresture to the forest: and is finable, and the house may be demolished: but the justice in eire may suffer it to stand, and may impose a rent upon it. By the judges of both benches. The owner of a freehold in a wood, in a forest, may cut down any wood there without the licence or view of the forester, without a prescription: so he may also in a chase, if in the forest and chase he leaves sufficient vert for the game. 2 E. 2. Fitz. 9. the time of E. 1. Fitz. Trespass, 139. Co. 4 Inst. title Forest. Manwood in his book of Forest Laws. Croke, 5 Jac. 155.

7. Eliz. Dyer, 240. Forrest, Chace. 3 Inst. 204. 1 Inst. 115.

3 Dyer's Reports, p. 267. b. case 14.

A. D. 1568.

Trespass *quære clausum fregit*, at South Killyworth, and fished in his several fishery there, &c. and made an assault upon the plaintiff, and beat him, &c. The defendant as to the assault and battery pleaded not guilty, and pleaded a bar to the residue; to which the plaintiff made a new assignment, saying, that the close aforesaid, and the said place in which, &c. were four acres of meadow, called B. in South-K. aforesaid, and a several fishery in the water of Avon at South-K. aforesaid, on the east side of the aforesaid four acres of meadow, other than in the bar, &c. To which the defendant pleaded in bar, and said, that he was seised at the time of the trespass, &c. of the manor of Stanford and Downe upon Avon, in the county of Northampton,

In trespass, defendant pleads a fishery in one county and prescribes to draw his nets on plaintiff's soil in another; this shall be tried by visne of both counties. [21. Vin. Ab. 105.] Dy. 106. pl. 46. 264. 39. 27 H. 8. 7. 22 E. 4. 50. 27 H. 6. 47. b.

A. D. 1569. 1 Keeble, 722.

and of and in the several fishery, in the water of Avon, on the east side of the aforesaid four acres of meadow called B. running as well in South-K. aforesaid as in the aforesaid manor of S. and D. in the said county of N.; and prescribed to have a several fishery in the said water of Avon at South-K. aforesaid, as appurtenant to the said manor of S. and D. and also to go upon the said meadow to draw the nets when he fished there. And the plaintiff traversed the prescription in both points upon which they are at issue. And whether the trial thereof shall be by men of both counties was doubted; but for the issue of not guilty it is clearly to be tried in the county of Leicester: and by the opinion of the court, the other issue shall be tried by both counties. See post. fol. [316. b. pl. 4.]

6 E. 4. 13, 19. Br. Visne, 86. 10 E. 4. 10. 2 H. 7. 3. 4 H. 7. 18. Cro. 119 pl. 34.

A. D. 1569.

Patentee of the herbage of a forest may enclose or distrain, or have trespass for damage done to the grass, but not to the trees or the fruit.

Co. Lit. 4. b. 186. b. 8 Co. 137. 138. 11 Mo. 302. 5.

3 Dyer's Reports, p. 285. b. *case* 40.

The King's grantee or patentee of the herbage of a forest shall have trespass against any one who consumes or destroys the grass, but not the trees nor the fruit of them; and also shall take beasts damage-feasant there and the writ of trespass shall be *quare clausum fregit* as well as if it had been of land. And by the opinion of three judges in B. R. in Trin. Term, 2 H. 8. [Keilw 159. b.] the patentee may enclose the forest by such grant, &c.

H. 8. 6. 17 E. 4. 6. 21 H. 7. 37. a. 9 H. 6. 32. a. 36 H. 6. 3 H. 7. 10. b. 3. Mar. 126. a. 7 E. 6. 80. b.

A. D. 1572.

In trover for a hawk, the plaintiff must shew in his declaration that it was reclaimed.

7 Co. 18. 1 Cro. 18. 12 H. 8. 4. 1 Keb. 60.

Fines against Spencer. 3 Dyer's Reps. p. 306. *case* 6

Richard Fines, knight, brought an action upon the case against J. Spencer, knight, for a hawk, called Lanner; and counted, that whereas he was possessed of the said hawk as of his own proper goods, Woodstock, &c. he casually lost it at Banbury*, which afterwards came there to the hands of the defendant by finding. And that he knowing the hawk to belong

* Lord Raym. 251.

the plaintiff, sold him for money and merchandizes, to divers persons unknown, &c. The defendant pleaded that the hawk first after the loss came to the hands of one Geffries, who sold it to one Rowley, who gave it to the defendant, at Althon, in the county of Nor, and he sold it to Pulteney, &c. and upon this plea the plaintiff demurred in law. And this Term the matter was argued by the justices; and *Southcot* argued for the plaintiff, but *Whiddon* and *Catalyn*, *è contra*. And exception taken to the count, because it was not expressly alledged that the hawk was reclaimed or tame, according to the case in 13 E. 3. [24. a. pl. 2.] for taking and carrying away his deer without saying tame, &c. But *Southcot* said, that the words as of his proper goods, implied all, &c. And *Catlyn*'s argument was much founded upon *Bracton*, [lib. 2. c. 1.] who was judge of the realm, *ut asseritur*, *de his feris vel feræ naturæ animalibus et volatilibus quæ in nullius bonis sunt*. And the cases of a dead stag, and the dog called a blood-hound, 12 H. 4. fol. 3. and 9. were cited, &c.

A. D. 1572.

27 H. 8. 15. a. 13 E. 3. 24 a. Dy. 257. pl. 13. 301, 312, 316. 10 Co. 59. b. 22 H. 6. 59. 76 H. 6. 24. 10 E. 1. 13. 3. Cro. 125. [1 Com. dig. 219. 5 Bac. Ab. 963, and see 2 Black. Com. ch. 25. 1 Hawk. Pl. C. 113, 144. 1 H. H. P. C. 511, 512]

[2 Bl. Rep. 1117.]

And afterwards judgment was given against the plaintiff, *s.* that the bar was sufficient, (*a*) &c. in this term by *Catlin*: and afterwards the matter was brought into C. B. by a new action upon the case for a reclaimed hawk, called a Lanner, *cum tintinnabulis*, *s.* bells, &c. But by the award of Dyer the matter was compounded for forty sheep and one ram, given by Spencer from his flock at Wormeleyton. M. 14 and 15 of the now queen.

2 Buls. 202. 1 Keb. 53. 7 Co. 17.

Thomas Beauford, knight, brought an action of trover, and declared, and found for him; and he had judgment. Defendant brought a writ of error, and assigned, first, because it is not said that the hawk was reclaimed; but on the reading of the record it appeared that the plaintiff declared that he was possessed of a certain hawk called a Lanner, reclaimed; wherefore the exception taken was not allowed.

15 Car. Cro. fol. 545. Sir Martin Lister v. Home.

(*a*) The plea now in this case would be only the general issue. See Bul. Ni. Pr. 16. 1. Com. dig. 224.

A. D. 1574.

3 Dyer's Reports, p. 326. b. case 3.

The king is seised of a chase; and A being lieutenant thereof in fee, prescribes to hunt stray deer into the manor of S. as a purlieu; the manor comes to the king, who grants it to B. *ita quod* none shall enter without the leave of B. This unity of possession and grant does not destroy the prescriptive right of A. Dy. 348. b.

The chase of Waddon is the inheritance of the crown, and the Lord Gray lieutenant thereof in fee; and he, and his ancestors, &c. and their keepers, by prescription, have used to hunt therein, as well by night as by day, the hinds wandering in the manor of one Fortescue of S. adjoining to the said chase, as in the purlieus of the chase; but separated by a hedge and ditch. And Fortescue had, by the queen's grant, as well the said manor as the free warren in the demesne lands thereof, as well by her own grant as by confirmation of ancient former charters, with the words, "so that none shall enter into that warren to chase, without the licence and will of F." The keepers of the Lord Gray, in August last, were disturbed and beaten for using that liberty in hunting in the said demesnes; with great violence and hurt done by the servants of F. (for which they were indicted) and by the command of their master. Since which time a servant of the Lord Gray, being in the company of the keeper, and wounded in the same affray, is dead of the strokes, &c. This matter being first heard before the council, was committed for examination of the law points to the two chief justices, and the attorney-general; who having heard the parties, and their counsel, thought the law to be, that the prescription being proved true, (which F. denied,) notwithstanding the unity of possession of the chase, and manor of S. in the queen, and notwithstanding the grant of the queen herself, and her confirmation of the warren with the general words of prohibition aforesaid, which extend only to the subject, the liberty of the purlieu remains unextinguished; and then the killing above is not justifiable by the Stat. *de Malefactoribus in parcis, Forestis et Warrennis*, &c. [21 E. 3. st. 2.]

4. Inst. 99.

43 E. 3. 22. b. 11 H. 7. 25. 11 H. 4. 5. 13 H. 6. 31. 30 H. 8. 43. Davies, 5. b. Dy. 295. 5 Bulst. 339. [But see 4 Inst. 303. Wood Inst. 202.] [1 H. H. P. C. 491. 5 Com. Dig. 520. Poph. 167.]

Cary's Reports, 104. A. D. 1579.

The question was for a liberty of common fishing, and ordered for the plaintant; and upon affidavit made the defendants have broken the same, ordered an attachment shall go against them; bailiffs, burgesses, and commonalty of the town of Yarmouth plaintants, William Paston *et aliis*, defendants, An. 21 Eliz. Liberty for a common fishing.

Playter's Case, 5 *Co. Rep.* 25 & 26 *Eliz.*—*K. B.* * A. D. 1581

Playter brought an action of trespass against Warne, *quare clausum suum fregit, et (a) pisces (b) suos cepit, &c.* (without shewing the number or nature of the fish;) the defendant pleaded not guilty, and was found guilty to the damage, &c. And now this Term in arrest of judgment it was shewed, that the declaration (which by the law ought to be certain, because it is in a manner the foundation of the suit) was in the case at bar altogether uncertain for two causes.

1. It doth not appear by the declaration, of what *(c)* nature the fish were, pikes, tenches, breams, carps, roaches, &c.

2. The certain *(d)* number of them doth not appear, but generally *pisces suos cepit;* to which it was answered by the plaintiff's counsel:

1. That it was good by the common law, for the verdict hath found the defendant guilty to damages, and therefore it is not now material of what nature, or of what number the fish were, but taking of fish to damages, in which case the verdict hath made the declaration (if it wants form) good.

2. They conceived that the delaration in an action of trespass, without expressing the number or nature of the fish was good enough, forasmuch as the fish themselves are not to be recovered, but damages for them; as in 20 H. 6. 19. in a writ of *(e)* deceit for purchasing and casting a protection, and doth not shew in certain of

* 1 Salk. 643. Carth. 49. Rep. Q A. 66 Lucas, 140.

(a) Palm. 101 Cr Jac. 665.

(b) 1 Ventr. 122, 123. 3 Wilson, 292. W Jones, 440. Cro. Car. 553. 1 Lev. 203.

(c) 1 Vent. 105, 106. 272. 1 Roll. Rep. 25. Hard. 132. Palm. 101. Cro. Car. 13. Cro. Eliz. 837. 2 Roll. Rep. 442.

(d) Cr. Car. 18. Plowd. 128. b. Cro. Eliz. 866. 2 Roll. Rep. 269, 270. 1 Roll. Rep. 25. Cro. Jac. 435. Hardr. 132. Godb. 370. 1 Vent. 272.

(e) Doct. pl. 87. 20 H. 6. 18. a.

A. D. 1584. Litz. Discont. 15.

what nature the first writ was (as in formedon, a *Quare*, or other writ) which was delayed by the protection, and yet the writ was adjudged good: and in trespass on the case the writ was, that the plaintiff did retain the defendant, *pro quadam pecuniæ summa solvend'*. &c. without shewing the quantity of the sum, and yet held good in 11 H. 6. 55. b.

(a) 8 Co. 57. a. Salk. 129. 361. 5 Geo. 1. c. 13.

3. If the law doth require more *(a)* certainty as to the fish, then it shall be intended that the judges before whom this issue was tried, did direct the jury to find the defendant guilty only for the close for which the declaration was good, and not for the fish, for which the declaration was insufficient.

1. Admitting that the declaration was insufficient in the form thereof by the common law, and that it was not made good by the verdict, yet they conceived that it was remedied by the stat. of 18 El. cap. 14. (for the statute of 32 H. 8. c. 30. doth not extend to counts. By which act of 18 El. after verdicts it is provided "that all defaults in form in any writ original or judicial, count, declaration, plaint, bill, or demand, are remedied, and judgment for them shall not be stayed. And it was said, that the omission of the number and nature is but of the form and not of the substance of the action, but the substance is for the taking of the fish: but it was resolved by Sir Christopher Wray, Chief Justice, Sir T. Gawdy and the whole court, against the plaintiff.

And as to the first and second objections, it was answered and resolved, that the declaration was insufficient and was not made good by the verdict, for the declaration ought to reduce the generalty of the writ to particularity, and to declare that which is briefly touched in the writ in certainty, to which the defendant may have certain answer, and on which a certain judgment may be given, *quia (b) oportet quod certa res deducatur*,

(b) 1 Co. Lit. 90. a.

judicium. And true it is, if this action had been brought by original, the writ should be general; but the declaration ought to have comprehended the fish in (*c*) certain; and therewith agree all the precedents, and 4 H. 6. 11. b. where the writ was *quare piscem* (*d*) *cepit*, and declared so many pikes in certain; and although the writ was *piscem* in the singular number, yet it was well, for *pisces, est nomen collectivum*, in which the plural number is comprehended. *Vide* 21 H. 6. 39. a. b. acc. that (*e*) the certainty of the fish shall be alledged in the declaration; and great inconvenience would thereof follow, for unless the issue hath certainty with which the jury may be charged, on such a general uncertainty they cannot be charged in attaint, if they give a false verdict.

As to the third objection it was answered and resolved, that when the jurors have found the defendant guilty (*f*) generally of the trespass in the declaration, &c. *that*, without question, doth extend to both the trespasses, and no such intendment should be taken as was objected: but if the plaintiff's counsel had done wisely, they would have caused the damages to have been (*g*) severed, that is to say, so much for the fish, and so much for breaking the close, and then the plaintiff should recover damages for breaking the close, with his costs.

As to the last objection, it was agreed by the whole court, that the omitting of the nature and number of the fish, was a matter of substance, and not of form to be remedied by the said statute of (*a*) 18 Eliz. for want of form within the said act is such matter of course, that the (*b*) clerk might have supplied and amended it without any information of the party, for the party ought to inform the truth of the matter, and the clerk ought to draw it in form: but in the case at bar, the clerk, without information of the party, could not know the nature or the number of fish; and therefore it is not

A. D. 1584.

Sav. a. 3.
[illegible] b. 93.
Hard. 132.
(*c*) Hard. 132.
Co. Lit. 303. a.
Plow. Com. 121, 122.
Cr. Car. 13. 573.
2 Roll. Rep. 96.
Godb. 370.
Cro El. 787.
Latch. 195.
Cr. Jac. 435. 605. Palm. 101. 447.
1 Vent. 53. 105, 106. 272. 339.
2 Jones, 109.
Doct. pl. 87.
Kielw. 153. pl. 2. Noy, 91.
O. Bendl. 174.
(*d*) Br. General Brief, 9 Doct. pl. cit. 34. 384.
Fitz. Brief, 27.
Br. Brief, 209.
Br. Faux Latin, 51.
(*e*) Fitz. Brief, 92.
Br. Faux Latin, 93.
(*f*) 2 Sand. 170, 171.
Lane, 93.
(*g*) Moor, 708.
(*a*) 18 El. c. 14.
(*b*) Palm. 123, 124. Cr. Car. 147, 148.
1 Leon. 360.

A. D. 1584. want of form within the purview of the said act. Bu

(c) 1 Jones, 199. Wray, Chief Justice, said, that every *(c)* misprision o a clerk in a thing, which he might have supplied and amended without information of the party, is not reme

(d) Hutt. 57. 79. Cr. Jac. 238. 411. 545. 546. 549. 685. 8 Co. 159. a. Cr. El. 350. 711, 712. 1 Roll. 603. 927. Moor, 566. 1 Bulst. 22, 23. Cr. Car. 225, died by the said act: as if a writ be brought agains executors in the *(d) debet* and *detinet*, this is the faul of the clerk; but because it is in matter of substance that is to say, in the point of the action, and not want o form, as the statute speaks, it is not remedied by th said act. So there is a difference between matter o course and matter of substance, which the clerk migh have amended.

236. Palm. 116, 117. Noy. 137. 2 Roll Rep. 131, 132, 153. Stil. 61. 80, 8 Poph. 121. 1 Brownl. 156. 2 Brownl. 202, 203, 204, 205, 206, 207. 1 Mo Rep. 185. Allem. 31. 42, 43. Lit. Rep. 342. 1 Keb. 139, 193. 1 Sid 26 342. 379. 2 Jones, 169, 170. Hob. 282. 1 Vent. 271, 272.

A. D. 1585. *Mich. 27 Eliz.—Onion's Case.*

Costs. In an action upon the statute of 5 *Eliz.* for hunting i his park, the statute gives treble damages: It was th opinion of the justices, that notwithstanding that th statute gives treble damages, that the plaintiff shoul have costs also.

A. D. 1587. *Mich. 29 Eliz.—In the King's Bench.*

Owen, 114. 1 Cro. 876. 2 Cro. 195. 229. Godb. 123. In an action of trespass for breaking of the plaintiff' close, and killing of eighteen conies there; the de fendant, as to all the trespass, but to the killing of th conies, pleaded not guilty: and as to the killing c the said conies, he said that the place where is a heath in which he hath common of pasture, and that he foun the conies eating the grass there, and he killed them and carried them away, as it was lawful for him to do *Cowper*. Although conies be *feræ naturæ*, yet when the are in in-grounds, they are reduced to such a property that if they be killed or carried away, I shall have a

action of trespass, *Vid.* 43 E. 3. 24. And if a deer be hunted by the plaintiff in a forest, and afterwards in hunting it be driven out of the forest, and the forester doth follow the chace, and the plaintiff kill the deer in his own grounds, yet the forester may enter into the land of the plaintiff, and retake the deer, 12 H. 8, 9. And although the defendant hath common in the soil; yet he cannot meddle with the wood there, nor with the land, nor with the grass, otherwise than with the feeding of his cattle, for he hath but a faint interest; and if he who hath the freehold in the land, bringeth an action of trespass against such a commoner for entering into his land, and the defendant plead not guilty, he cannot give in evidence that he hath common there: and it hath been late adjudged, that where commoners prescribe that the lord hath used to put in such a pasture but so many beasts, that such a prescription is a void prescription. It was argued on the other side, that the owner of the soil hath not the true property of the conies in him, but a kind of property: and see F. N. B. 86 and 87. *Quare clausum fregit, et 20 cuniculos cepit:* Against a stranger he may have an action, but not against the commoner, because he hath wrong in his common by the feeding of the conies there; for, although he hath not an interest in the soil, yet he hath an interest in the profits of it, and a commoner may distrain the beasts of him who hath not right of common for damage feasance, as the books are, 4 H. 7. 3. 15 H. 7. 15. and there the commoner hath not any remedy, if he cannot enter and kill the conies, for he cannot take them damage-feasance, nor can impound them; for no replevin lieth of them; if the owner of the soil ploweth the lands, yet the commoner may put in his cattle, claiming his common, and he may well justify the same, because the wrong beginneth in the owner of the soil. At another day the case was moved again; and then it was argued

A. D. 1587. Godb. 123.

A. D. 1587. by Coke, and he said, The point is, whether a commoner having common of pasture may kill the conies which are upon the ground: and he argued, that he might not. And first, he said, it is to be considered what interest he who hath the freehold may have in such things as are, *feræ naturæ;* and then what authority the commoner hath in the ground in which he hath common. As to the first point, he said, that although such beasts are *feræ naturæ*, yet they are reduced to such a property when they are in my ground by reason of my possession which I then have of them, that I may have an action of trespass against him who taketh them away; as is the book in 12 E. 3.; if one hath deer in his park, and another taketh them away, he may have an action of trespass for the taking of them: see 12 H. 8. if a keeper or forester follow a buck which is chased out of the park or forest, although he who hunteth him killeth the buck in his own ground, yet the keeper or forester may enter into his ground, and seize the deer, because the property and possession of the deer is yet in them by their pursuit. In 7 H. 6. it is holden, that if a wild beast doth go out of the park, the owner of the soil hath lost his property in it; but upon the said book, it may be well collected, that whilst it remains in the park that the owner of the park hath property in it: for 18 E. 4. 14. it is doubted, whether a man can have property in such things, which are *feræ naturæ*. But in 1 H. 7. 6. it is holden, that an action of account lieth for things which are *feræ naturæ;* and see 14 H. 8. 1. In the Bishop of London's case, and 22 H. 6. 59. that as long as such things are in the parties ground, they are in his possession, and he hath a property in them; and in an action brought for them the writ shall be *quare damas suas cepit*, by Newton. And see in the Register, fol. 102. where an action was brought, *quare ducent. Cuniculos suos pretii, &c. cepit.* It hath been

objected on the other side, that the defendant hath common there; to that I answer, admit he hath common, yet he hath not an interest in the soil, for he cannot meddle with the wood, grass, or other profit arising of the soil, but the interest which the commoner hath, is only the feeding of the grass with the mouths of his cattle: and if he who hath the freehold in the ground, doth bring an action against the commoner for entering into his land; if the defendant pleads not guilty, he cannot give evidence that he hath common there, for such evidence will not maintain the issue. See 22 Ass. A commoner cannot take in the cattle of a stranger to agist upon the common; and therewith agreeth the book of 12 H. 8. and so it hath been adjudged in this court. *Godfrey*, contrary. And he argued, that it is lawful for the commoner to kill the conies feeding in the common: and he agreed in all the cases which were put by Coke; and farther he said, that the owner of the ground had not an absolute, but a kind of a qualified property in the conies; and therefore see the book of 3 H. 6. and F. N. B. If a writ of trespass be brought, *quare cuniculos suos cepit*, the writ shall abate; and yet he hath a kind of property, or a possession rather, in them. I grant that against a stranger the plaintiff might have his action for killing of his conies, but not against the commoner, because the commoner hath a wrong done unto him by the conies eating of his common, and therefore he may kill them; and although the commoner may not meddle with the land, because he hath not an interest in it; yet in some cases he may meddle with the profits of it, and he may distrain the cattle of a stranger there, damage-feasance; as the book is in 15 H. 7. I grant that it is not lawful for tenant for life to kill the conies of him who hath free warren in the land. For if a man bringeth an action of trespass, *quare warrennam suam infregit, et cuniculos suos cepit*: it is no plea for the de- A. D. 1587.

A. D. 1587. fendant to say, that it is his freehold. See 43 E. 3. accordingly, in L. 5. E. 4. In trespass, *quare clausum et cuniculos suos cepit*: the defendant said, that the plaintiff made a lease at will to J. S. of the land, and that he, as servant to the said J. S. did kill the conies there, and it was holden a good plea; and yet it is there said, that by the grant of the land the conies do not pass but the reason of the book might be, as I conceive, because the feeding on the land with the conies is to his damage, and therefore, that he might justify the killing of them: and so are the books of 21 H. 7. and 4 E. 4 if I have common of pasture in lands, and the tenant ploweth up the land, I shall have an action upon the case in the nature of a *quod permittat*. And in 9 E. 4 if one hath lands adjoining to my land, and leviet a nuisance, I may enter upon the land, and abate the nuisance: so if a man taketh my goods and carriet them unto his own lands, I may enter therein, and seize my goods: so, if a tenant of the freehold plows the land, and soweth it with corn, the commoner may put in his cattle, and therewith eat the corn growing upon the land: so, if a man do falsely imprison me, and put me in his house, I may justify the breaking open of his house to get forth. In 21 H. 6. All the inhabitants of a town do prescribe to have common in such a field, every year after harvest, if one particular man who hath freehold land, with the said field sowed, will not within convenient time gather in his corn, but suffer the same to continue there, of purpose to bar the inhabitants of their common, the inhabitants of the town may put in their cattle into the said field, and therewith eat his corn, and he shall have no remedy for their so doing; and he put the question, What remedy the commoner should have for the eating and destroying of his common which his cattle should have, for that he can neither distrain them damage-feasance, nor impound them: for a replevi

doth not lie of conies; and therefore he said, he hath no other remedy but to kill and destroy the conies. See 19 E. 3. and F. N. B. If the lord doth surcharge the common, the commoner may have an action against him; but in this case he can have no action.—*Gaudy*, Justice. The commoner cannot destroy or kill the conies, because he may have other remedy.—*Shute*, Justice. A commoner cannot take or distrain the beasts of the tenant of the land for damage-feasance, therefore he cannot take or destroy the conies which are upon the land, because he may have other remedy, for he may have an action upon the case, or an assize for putting of the conies upon the land, if the owner of the land leave not sufficient common for the cattle of the commoner; and afterwards judgment was given for the plaintiff. A. D. 1587.

Bond's Case; Moore's Rep. p. 238. 29 *Elizabeth. A. D.* 1587.

In the Exchequer the attorney-general exhibited an information against James Bond, for that he had erected a pigeon-house on certain land, which he held for term of years, (the reversion thereof being in the queen,) parcel of the manor of Thorp, in the county of Surrey, of which manor the queen is seised in fee; and *Manwood*, Chief Baron, and *Gent*, Baron, and *Popham*, the attorney-general, and all the counsel at the bar took the law to be, that a pigeon-house was considered and accounted as a common nuisance, and therefore they granted an injunction to him to desist from building it. For *Manwood* said, that no one could erect a dove-house *de novo* but the lord of the manor, and the parson of the church; and by the ancient law this was inquirable at the leet, among common nuisances; and pending this motion, Lord Burghleigh came into the court, and being high-treasurer, said that Mr. Plowden was of opinion hat no one but the lord of the manor, or the parson of

A. D. 1587. the church, could erect a dove-house. He said likewise, that he had heard Mountague, Justice, say the same in a large assembly.

A. D. 1588. *Owen Rep. p. 93. Trin. 30 Eliz.—Ireland v. Higgins*

Rot. 103 vel. 43. In an action of the case the plaintiff declared, That whereas a dog came to the hands of the defendant which belonged to the plaintiff, the defendant did assume to deliver the said dog to the plaintiff upon request, and that

3 Leon. 219. S. C. the plaintiff had requested him, and he did not deliver the dog, *ad dammum*, &c. and hereupon the defendant demurred.—*Leigh*, for the defendant. Here is no consideration; for when the plaintiff is out of the possession of his dog, he hath lost his interest in him, for a dog is *feræ naturæ*, and therefore when he is out of possession he hath no remedy. 22 H. 6. 10 H. 7. 16 Ed. 4. and he cited Fynes and Sir John Spencer's case, in Dyer where a trespass will not lie for a hawk. Also, by the grant of *omnia bona et catalla*, dogs do not pass, nor are titheable, nor are assets.

Tanfield, contra. Horses, cows, and all cattle which are most profitable for service of man, were, at first, *feræ naturæ*, and so were dogs also; but since by use nothing is so familiar and domestic to man than is a dog, and then he cannot be *feræ naturæ*; and therefore a trespass will lie for a dog, if he declare his dog, for that word does imply it is his domestic dog; and he much relied on a book, the roll whereof he had seen. Trin. 15 H. 7. Rot. 25. where a man justified in a trespass of battery in defence of his dog. And in 2 Ed. 2. Avowry 182. replevin was brought of a ferret. And in 23 Eliz. Leek's case, where one had judgment to recover great damages for a blood-hound. And, as to the case of Fines and Spencer, the reason why the plaintiff had no judgment was, because he did not shew that the hawk was reclaimed; but after he brought a new action, and

had great damages. And at last it was adjudged by all the court, that the action is maintainable, and judgment commanded to be entered, *nisi*, &c. A. D. 1588.

Trin. 31 *Eliz.*—*Owen's Rep. p.* 34. A. D. 1589.

The Lord Rich was seised of Hadley park, and of all the tythes thereof, and paid for the tythes but one buck in the summer, and a doe in the winter, for thirty years past. The park was disparked and turned into arable land, and the parson would not receive this fee buck and doe, but would have tythe corn, and thereupon brought him into the spiritual court, and he brought a prohibition. And *Carus* and *Catlin* said, that he need not pay other tythes but buck and doe, for, although they be not tytheable, yet may they be paid by composition, and he may not take them, but they are to be delivered to him; and in like manner partridges and pheasants in a garden are not tytheable, yet may they be paid in lieu of tythes, and shall be brought dead to the parson, and although there be no park, yet may he give a buck out of another park, and perhaps it may be made a park again.

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7 Coke's Reports, p. 15 b.—*34 Eliz.* A. D. 1592.

Between the queen, and the lady Joan Young, late the wife of Sir John Young, knight, deceased, and Thomas Saunger, defendants, the case was such: an office was found at W. in the county of Dorset, 18th of September ann. 32 El. before Sir Matthew Arundel and other commissioners of the queen under the great seal, Quod a villâ de Abbotsbury, in præd' com' Dorset, usque ad mare per insulam de Portland in eodem com' est quædam æstuaria, Anglicè a mere or fleet, in quam mare fluit et refluit, in qua quidem æstuaria sunt 500 cigni, quorum 410. sunt albi, et 90 sunt cignetti, et quod omnes prædicti cigni et cignetti sunt in possessione J. 2 Roll. Rep. 30.

A. D. 1592. Young et Tho. Saunger, et quod quilibet eorem o valoris 2*s.* 6*d.* quodque major pars tempore caption dictæ inquisitionis minime fuer' signat': which offic being certified into the Exchequer, a writ was directe to the sheriff of the same county to seize all the sai white swans not marked, by force whereof the sheri returned that he had seized four hundred white swan to which afterwards, *scil.* Hilary, 34 Eliz. the sai Joan Young and Tho. Saunger pleaded; Quod præ æstuaria sive aqua, jacet in paroch' de Abbotsbury com. Dorset (and abutted it) and that before the i quisition taken, the abbot of Abbotsbury was seised præd' æstuaria, et de ripis et solo ejusdem in fee, a that at the time of the inquisition, and time out mind, fuit et adhuc est quidam volatus cignorum cignettor' feror', vocat' a game of wild swans, in æst aria sive aqua illa, et ripis, et solo ejusdem nidificam gignen' et frequentant' Anglice haunting, de quo qu dem volatu cignor' et cignettor' præd' abbas et omn prædecessores sui abbates monasterii præd', per totu tempus prædict' habuere et gavisi fuerunt, et habere guadere consueverunt, tot' profic' et increment' omniu et singulor' cignor' et cignettor' feror', in æstuaria præ nidificant', gignen' et frequent', qui quidem cigni cignetti per totum tempus præd' fuerunt feræ natur et infra idem tempus iidem cigni et cignetti seu eoru aliqui aliquo signo non usi fuissent, nec consuevisse signari, nisi quod præd' nuper abbas et prædecessor sui præd' per totum tempus præd' ad eorum libitu quosd' seu aliquos de minorib' cignettis annuatim pu lulant' quos ad usum et culinæ et hospitalitatis s statuerunt expendend, in hunc modum annuatim si nare consueverunt, et usi fuerunt, viz. amputare media juncturam unius alæ, Angl' to cut off the pinion of o wing, cujuslibet talis cignetti, eâ intentione, quod ci netti sic amputati minime valerent avolare. And

terwards the said abbot surrendered the premises to K. H. 8. who anno 35th of his reign granted to Giles (a) Strangways, Esq. by his letters patent inter alia, totam illam liberam piscariam notr' in aqua, vocat' the fleet in Abbotsbury præd', ac omnia mesuag', aquas, piscat' et cætera hæreditam' nostr' quæcunque in Abbotsbury, in dict' com' Dorset dict' nuper monasterio, &c. adeo plene et integre, &c. et in tam amplis modo et formâ, &c. and that the said Giles died, and it descended to Giles Strangways his cousin and heir, who demised to the defendants the said game of swans for one year, &c. and prayed quod manus dictæ dominæ reginæ amoveantur. Upon which the queen's attorney did demur in law. A.D. 1592. (a) Dav. 57, 8.

1. It was resolved, that all white swans not marked, which having gained their natural liberty, and are swimming in an open and common river might be seised to the king's use by his prerogative, because volatilia, (quæ sunt feræ naturæ) alia sunt regalia, alia communia: and so aquatilium, alia sunt regalia, alia communia: as a swan is a royal fowl; and all those, the property whereof is not known, do belong to the king by his prerogative: and so (b) whales and sturgeons are royal fish and belong to the king by his prerogative. And there hath been an ancient officer of the king's, called magister deductus cignorum, which continues to this day. But it was resolved also, that the subject might have property in white swans not marked, as some may have swans not marked in his private waters, the property of which belongs to him, and not to the king; and if they escape out of his private waters into an open and common river, he may bring them back and take them again. And therewith agreeth Bracton, lib. 2. c. 1. fol. 9. Si autem animalia fera facta fuerint mansueta, et ex consuetudine eunt et redeunt, volant et revolant, (ut sunt cervi, cigni, pavones, (b) Dav. 56. a. Staml. Prærog. 37. b. 38. a. 5 Co. 108. b. Plowd. 315. b.

A. D. 1592. et columbæ, et hujusmodi) eousque nostra intelligant quamdiu habuerint animum reverendi. But if the have gained their natural liberty, and are swimming open and common rivers, the king's officer may sei them in the open and common river for the king: t one white swan without such pursuit, as aforesai cannot be known from another, and when the proper of a swan cannot be known, the same being of its n ture a fowl royal, doth belong to the king; and in th

Fit. Barr. 6. Br. Estray, 3. case the book of 7 H. 6. 27. b. was vouched, whe Sir John Tiptoft brought an action of trespass for wron ful taking of his swans; the defendant pleaded that was seised of the lordship of S. within which lordsh all those whose estate he hath in the said lordship, h had time out of mind, all estraies being within the s manor; and we say that the said said swans w estraying at the time in the place where, &c. and we landlords did seise and make proclamation in fairs a markets, and so soon as we had notice that they w your swans, we delivered them to you at such a pla The plaintiff replied, that he was seised of the mano B. joining to the lordship of S. and we say, that and our ancestors, and all those, &c. have used time of mind, to have swans swimming through all the lo ship of S. and we say, that long time before the tak we put them in there, and gave notice of them to defendant that they were our swans; and prayed damages. And the opinion of Strange there was approved by the court, that the replication was go for when the plaintiff may lawfully put his swans th they cannot be estraies, no more than the cattle of can be estraies in such place where they ought to h common; because they are there where the owner h an interest to put them, and in which place they m be without negligence or laches of the owner. Ou which case, these points were observed concerning swa

1. That every one who hath swans within this manor, that is to say, within his private waters, hath a property in them, for the writ of trespass was of wrongful taking his swans, *scil.* Quære cignos, suos, &c. 2. That one may prescribe to have a game of swans within his manor, as well as a warren or park. 3. That he who hath such a game of swans may prescribe, that his swans may swim within the manor of (*a*) another. 4. That a swan may be an estray, and so cannot any other fowl, as I have read in any book. In (*b*) 2 R. 3. 15. b. and 16. a. the Lord Strange and Sir John Charlton brought an action of trespass against three, because the defendants had taken and carried away forty cignets of the plaintiff's in the county of Bucks, to his damages of 10*l.* One of the defendants pleaded, that the water of the Thames ran through the whole realm, and that the county of Buckingham is adjoining to the Thames, and that the custom of the said county of Buckingham is, and hath been time out of mind, that every swan (for cignet in the book is taken for a swan) which hath its course in any water, which water runs to the Thames within the same county, that if any swan comes on the land of any man, and there builds, and hath cignets on the same land, that then he who hath the property of the swan shall have two of the cignets, and he who hath the land shall have the third cignet, which shall be of less value than the other two; and that was adjudged a good custom, because the possessor of the land suffers them to build there, where he may drive them off. And by this judgment it also appears, that a man may alledge a custom or prescribe in swans or cignets. And in the same case it is said, that the truth of the matter was, that the Lord Strange had certain swans which were cocks, and Sir John Charleton certain swans which were hens, and they had cignets between them; and for these cignets the owners

A. D. 1592.

3 Keb. 315.

(*a*) 3 Keb. 275.

(*b*) Cr. El. 275.

Ante, 776

Cro. El. 725.

A.D. 1592. did join in one action, for in such case by the gene
custom of the realm, which is the common law in su
case, the cignets do belong to both the owners in co
mon equally, *sc.* to the owner of the cock, and the ow
of the hen; and the cignets shall be divided betw
them. And the law thereof is founded on a reason
nature; for the cock-swan is an emblem or represen
tion of an affectionate and true husband to his w
above all other fowls; for the cock-swan holdeth hi
self to one female only, and for this cause nature h
conferred on him a gift beyond all others; that is,
die so joyfully, that he sings sweetly when he die
upon which the poet saith:—

"Dulcia defecta modulatur carmina lingua,
Cantator, cygnus, funeris ipse sui, &c."

And therefore this case of the swan doth differ fr
the case of kine, or other brute beasts. *Vide* 7 H. 4.
And it was agreed, that none can have a swan-ma
which in Latin is called (cigninota) unless it be by
grant of the king, or of his officers authorized thereto,
by prescription. And if he hath a lawful swan-ma
and hath swans swimming in open and common rive
lawfully marked therewith, they belong to him ratio
privilegii. But none shall have a swan-mark, or ga
of swans, unless he hath lands or tenements of an est
of freehold, of the yearly value of five marks, abo
all charges, on pain of forfeiture of his swans, wher
the king shall have one moiety, and he who seizes sh
have the other moiety; and that is by the stat. of
Ed. 4. cap. 6. And he who hath such swan-mark m
grant it over. And thereof I have seen a notable p
cedent in the time of H. 6. which is such, notum
omnib' hominib' præsentib' et futuris, quodego J. Ste
ard, miles, dedi et concessi Tho' fil' meo primogenito
hæredib' suis, cigninot' meam armor' meor', prout
margine laterali pingitur, quæ mihi jure hæredit

descendeb' post mort' J. Steward mil' patris mei: ha- A. D. 1592.
bend' sibi et hæredib' suis, una cum omnib' cignis et cig-
nicul' cum dicta nota baculi nodati signat', sub condit'
quod quilib' feria solis durante vitâ, a gula Augusti
usque ad Carnisprivium apud dom' meam de Darford,
unum cignicul' bene signat' mihi aut meis deliberet,
quod si defecerit, tunc volo, quod hoc præsens chiro-
graphum cassetur penitus, et pro nihilo habeatur. In
cuj' rei testimon' ad instant' Matildæ uxor' meæ, meum
sigil' secret' Christi crucifixi præsentib' feci apponi. 3 Inst. 98.
Hiis testib' R. Clerico, J. de Conyers, Alano Fabro, et 109, 110.
al' dat. apud dom' meam mansional' de Darf. in vigillia Cro. El. 125.
S. Dunst' ep' an' regni Regis Hen' post conquest' An- Cro. Car. 388.
gliæ sexti 14. And in the margent was painted a 545. 554.
little ragged staff. And in this case it was resolved, Co. Lit. 47. a.
that in some of them which are feræ naturæ, a man hath
jus proprietatis, a right of property, and in some of
them a man hath jus privilegii, a right of privilege.
And there are three manner of rights of property, *scil.*
property absolute, property qualified, and property Doct. pl. 314.
possessory. A man hath not absolute property in any
thing which is feræ naturæ, but in those which are do-
mitæ naturæ. Property qualified and possessory a man
may have in those which are feræ naturæ, and to such
property a man may attain by two ways, by industry,
or ratione impotentiæ et loci, by industry as by taking
them, or by making them mansueta, i. e. manui assueta,
or domestica, i. e. domui assueta: but in those which
are feræ naturæ, and by industry are made tame, a man
hath but a qualified property in them, *scil.* so long as
they remain tame, for if they do attain to their natural
liberty, and have not animum revertendi, the property
is lost, ratione impotentiæ et loci: as if a man has
young shovelers or goshawks, or the like, which are
feræ naturæ, and they build in my land, I have pos-
sessory property in them, for if one takes them when

A. D. 1592. they cannot fly, the owner of the soil shall have an actio of trespass, Quare boscum suum fregit, et tres pull espervor' suor', or ardear' suar' pretii tantum, nuper eod bosco nidificant', cepit et asportav' ; and therewi agreeth the Regist. and F. N. B. 86. L. and 89. K. Ed. 4. 14. 18 Ed. 4. 8. 14 H. 8. 1. b. Stamf. 25. &c. vide 12 H. 8. 4. and 18 H. 8. 12. But when man hath savage beasts ratione privilegii, as by reas of a park, warren, &c. he hath not any property in t deer, or conies, or pheasants, or partridges ; and ther fore in an action, Quare parcum warrennum, &c. fre et intrav', et 3. damas, lepores, cuniculos, phasian perdices, cepit et asportavit, he shall not say (suos) he hath no property in them, but they do belong to h ratione privil' for his game and pleasure, so long they remain in the privileged place; for if the own of the park dies, his heir shall have them, and not executors or administrators, because without them t park, which is an inheritance, is not complete ; nor c felony be committed of them, but of those which made tame, in which a man by his industry hath a property, felony may be committed. And therew agrees the rule of the book in 3 H. 6. 55. b. 8 E. 4. b. 22 H. 6. 59. which is ill reported, and 43 E. 4. vide 22 Ass. 12 H. 8. 3. 13 El. Dyer, 306. 38 E 10. Vide 2 E. 2. tit. Distress, 2 E. 2. Avowry, 1 But a man may have property in some things wh are of so base nature, that no felony can be commit of them, and no man shall lose life or member for th as of a blood-hound, or mastiff, molossus, 12 H. 8. Vide 18 H. 8. 2. But he who steals the eggs of sw out of the nest, shall be imprisoned for a year an day, and fined at the will of the king ; one moiety to king, the other to the owner of the land where the e were so taken, and that is by the stat. of 11 H. 7. c 17. And it hath been said of old time, that he v

F. N. B. 86. M. 87. a. Cr. Car. 386. 554. Co. Lit. 47. a. F. N. B. 87. a. Co. Lit. 8. a. Cro. El. 372. Kelw. 118. a. Owen. 20. Golds. 129. 1 Rol. 916. Went. 81. Cro. Jac. 46, 47. Comyns, 54. 3 Lev. 227.

3 Inst. 98, 99. 109, 110.

3 Inst. 109. Stam. Cor. 25. b.

steals a swan in an open and common river, lawfully marked, the same swan (if it may be) or another swan should be hung in a house by the beak, and he who stole it, shall in recompense thereof be obliged to give the owner so much wheat that may cover all the swan, by putting and turning the wheat on the head of the swan, until the head of the swan be covered with the wheat. And it was resolved, that in the principal case the prescription was insufficient; for the effect of the prescription is to have all wild swans, which are feræ naturæ, and not marked, nidificant', gignent', et frequentant', within the said creek. And such prescription for a warren would be insufficient, *scil.* to have all pheasants and partridges, nidificantes, gignentes, and frequenting within his manor. But he ought to say, to have free warren of them within his manor: for although they are nidificantes, gignentes, and frequenting within the manor, he cannot have them jure privilegii but so long as they are within the place. But it was resolved, that if the defendants had alledged, that within the said creek there had been, time out of mind, a game of wild swans not marked, building and breeding; and then had prescribed that such abbot and all his predecessors, &c. had used at all times to have and take to their use some of the said game of wild swans and their cignets within the said creek, it had been good; for although swans are royal fowls, yet in such a manner a man may prescribe in them; for that may have a lawful beginning by the king's grant: for in Rot. Parliam. 30 Ed. 3. part. 2. num. 20. the king granted to C. W. all wild swans unmarked between Oxford and London for seven years. In eodem Rot' an' 16 R. 2 p. 1. num' 39. the like grant of wild swans unmarked in the county of Cambridge to B. Bereford, kt. In eodem Rot' an' 1 H. 4. p. 6. num' 14. A grant made to J. Fenn, to survey and keep all wild swans unmarked, ita quod de

A. D. 1592.

Wing. Max. 17.

A. D. 1592 proficuo respondeat ad Scaccarium. By which it appears that the king may grant wild swans unmarked; and by consequence a man may prescribe in them within a certain place, because it may have a lawful beginning. And a man may prescribe to have royal fish within his manor, as it is held in 39 Ed. 3. 35. for the reason aforesaid. And yet without prescription they do belong to the king by his prerogative.

A. D. 1593.

Cro. Eliz. 125. 35 *Eliz.* *A. D.* 1593.

Trover lies for a grey-hound, and it need not be averred that he was tame. —A mastiff, a hound, a spaniel, and a tumbler, the law will take notice of. 3 Levinz, 330. 2 Leon. 283. 2 Bro. Ent. 144. 12 Hen 8. pl. 4. 5 Co. 7. 17. b. Hob. 283. 1 Saund. 84. 1 Roll. Abr. 5. Owen, 94. 2 Cro. 44. 463 3 Lev. 219. *cont.* Cro. Jac. 463. 2 Salk. 667.

Assumpit. The plaintiff declareth, that whereas he was possessed of a grey-hound, which came to the defendant's hands by trover, and that he promised to deliver it upon request, the defendant demurred upon the declaration.—*Lee* argued the action did not lie; for being out of the plaintiff's possession, he had no property in it, being *feræ naturæ*, 11 Eliz. Dyer, 306. 12 Hen. 8. and by a grant of *omnia bona et catalla*, a dog passeth not.—*Tanfield, contra.* He agreed that if it were *feræ naturæ* there was no consideration of the promise, but a dog is a thing that is tame by industry of man, and the law regardeth it as any other beast, and is of as good use: and there be four kind of dogs which the law regards, *viz.* a mastiff, a hound, which comprehends a grey-hound, a spaniel, and tumbler: and he had seen a precedent in 13 Hen. 7. Roll. 33. where in trespass of assault and battery, the defendant justified that J. S. was possessed of a dog *ut de bonis propriis*, and delivered it to him to keep, and that the plaintiff would have taken it from him, in which he resisted him; and in defence and custody of his dog he beat him, and the hurt which he had was *de son tort demesne*, &c. and to this the plaintiff was put to answer, and said *de son tort*, &c. which proveth a property in the dog, when he justifieth the beating of one in defence of it. 2 Edw. 2. "Avowry." A re-

plevin lieth of a ferret, which is of a more base nature, and 23 Eliz. J. S. brought trespass for taking of a blood-hound; and found for him, and he recovered 10*l.* damages. And the plaintiff need not in this case aver the dog was tame, for the law intends it, as of a horse. And it was adjudged for the plaintiff. A. D. 1593.

Owen's Reports, p. 20. Eliz. 37. A. D. 1595.

Grey brought an action of trespass against Bartholomew; the case was, A man did purchase divers fishes, *viz.* carpes, tenches, trout, &c. and put them into his pond for store, and then died. The question was, whether the heir or the executors should have the fish.—*Popham.* The heir shall have the deer in the park, and by the same reason the fish.—*Clench.* If the fish be stolen it is felony, so that it appears there is a property in them, vide 18 Ed. 4. 10 Ed. 4. 14. 22. Ass. 98. that stealing of tench out of a pool is felony, by which it seems they are but chattels.—*Popham.* The book is so, and so is the law, but that is of stealing fish out of a trunk, or some narrow place where they are put to be taken at will and pleasure; but otherwise it is where they are put into a pond.—*Fenner.* He which hath the water shall have the fish. And *Popham, ex assensu curiæ*, gave judgment for the heir. And in the principal case the executors did take the fish with nets, and the heir brought a trespass and adjudged maintainable. See what chattels executors shall have, and what not, in 21 H. 7. 26. 10 H. 7. 6. and 30. an account will lie for fish in a fish-pond, so in the 5 R. 2. Waste 97. an action of waste did lie against a guardian in chivalry, for taking fish out of a pool, by the statute of Magna Charta; but *quære* if it lies against a termor or guardian in socage upon an account for fish.

Fish in a pond go to the heir, not to the executor. Cro. Eliz. 372. and Gouldesb. 129. S. C.

Cro. Eliz. p. 547. 38 Eliz. A. D. 1596.

Action upon the case. Whereas he was seised of

An action for

A. D. 1596.

a nuisance will not lie against a man who has an adjoining warren, for damage done by conies.

S. C. Moor, 453. 580. 621. S. C. 5 Co. 104. b. 1 Roll. Abr. 405. Cro. Jac. 195. 229. 1 Burr. 259. 266. 268. 2 Bac. Abr. 613. 615. 2 Wils. 51.

certain lands in fee, and the defendant was seised o other lands adjoining, the defendant had made tw coney-burrows in his lands adjoining, and had pu conies in them, which increased to a great number, an went into the plaintiff's land, and destroyed his corn and made it barren, whereby he lost the profits of hi land, and therefore brought the action. The defendar pleads, that the plaintiff's land was late parcel of th manor of D. and that queen Mary, being seised of tha manor, granted it to Sir William Peto, and grante unto him to have warren in the said manor, and that th plaintiff's lands was conveyed unto him, and that S William Peto bargained and sold the manor to th defendant, and all warrens, &c. thereto appertaining or accepted and reputed as part of that manor, whereb he justifies. And it was hereupon demurred.—All th justices, without argument, resolved that the plea w ill; for he hath shewn a warren in gross in the pate tee, which is not conveyed unto him by the bargain an sale; for a warren is not parcel nor any member of manor; but it may be appertaining, but that is b prescription. But, Whether an action upon the ca lay upon this matter? was the only question.—*Ande son.* The action lies not; for although one hath co nies in his land, he hath not any property in ther because they be *feræ naturæ*. And to have an actio against one for damage done by savage and wild cre tures, wherein he hath not any interest, and they ca not be known whether they come out of his land, unreasonable: he who hath the damage thereby ma well kill them, and they may be said to be his coni when they are upon his lands *. And if other m have other warrens adjoining, against whom shall th action be brought? Truly, against none of them.-

Cro. Jac. 195. 2 Bac. Abr. 614.

* See 22 and 23 Car. 2. c. 5. s. 6. and 9 G. 1. c. 22.

Walmsley, accord. For the property of the conies is not in any, nor can any man so keep them, but that they will break out of themselves; which is reason that none can have them in his own land, unless by grant from the king, or by prescription: if otherwise, he is punishable in a *quo warranto*; for the queen hath the royalty in such things whereof none can have any property. This cause is not like to the cases put, on the other side, of erecting a lime-kiln, dye-house, or the like; for there the annoyance is by the act of the parties who make them; but it is not so here, for the conies of themselves went into the plaintiff's land, and he might take them when they came upon his land, and make profit of them. None may erect a dove-house but he who is lord of a manor; and if any other private man erects it, it is punishable in the leet as a common nuisance; but no action upon the case lies by any private man against him who erects it.—*Quod Anderson et Beaumond concesserunt.* And they said, they had seen it to be inquired of before the lord Dyer at the assises as a nuisance. And this case is not like to other cases which were put of nuisances; for there the *tort* is by the party himself who doth it; but here the putting the conies into his own land is not any *tort*, and if there be any wrong it is by the conies themselves, who are *feræ naturæ*; wherefore it is not reasonable to punish any other.—*Beaumand* agreed with the other justices *in omnibus*.—Wherefore afterward, by the assent of *Owen* also, it was adjudged for the defendant. 5 Co. 104. b.

A. D. 1596.

5 Co. 104. b.

Bedingfield v. Feake, Moore's Rep. p. 909. 38 *Eliz.*

A. D 1596.

A. D. 1596.

It was held that if a park has payed 10*s.* for all tithes and is afterwards disparked, and sown with corn, the 10*s.* only shall be paid. But if the prescription is for

S. C. Cro. Eliz. 467. Gwillim, 160. Owen, 74.

A. D. 1596. the deer and the herbage of the park, and not for whole park, and the park is afterwards disparked, sown with corn, the tithes shall be paid in kind; so a shoulder of each deer is prescribed to be paid for tithes, and the park be disparked, tithes shall be paid kind; if the prescription be to pay 10*s.* and one shoul of each deer, and the park is disparked, tithe shall payed in kind, not the 10*s.* only, as has been adjudg Mich. 21 and 22 Eliz. in C. B. Rot. 404. See A Num. 1186.

A. D. 1597. *Noy's Reports, p. 60. Eliz. 39.*

Debt reserved upon the lease of a warren of con The defendant pleads that the plaintiff had plowe field, parcel of the warren, by which the conies not sufficient pasture.—By the court (absent An son) That it is no plea. For it is not a rent, bu seniory in gross, due by reason of the contract: which the entry or user of that part is not any pension.

A. D. 1597. *Heddey v. Welhouse. Moore*, 474. 39 and 40 *E*

A. D. 1597.

Keilwey, 138. The court held in this case that fairs, markets, and free warrens, would not be extinguished by the coming into the hands of the crown, together with liberties, but that it is otherwise in the case of w estrays, felons goods and such kind of liberties. quære if it be so, if the fair, market, or warren, c mence by charter, and not by prescription.

A. D. 1598. *Moyle v. Mayle. Owen's Reports, p.* 66. 41 *El*

Noy, 70. S.C. Moyle brought an action of waste against Ma and declared that he had leased to him a manor a warren, and that he had destroyed a coney-bur

and subverted it, and assigned other wastes in cutting down certain thorns.—*Williams.* The action of waste will well lie; and said, that a warren consisted of two things, of a place of game, and of liberty; and to prove that a waste did lie for a liberty, he cited the Statute of Magna Charta, cap. 5. in which a warren is intended, also the Statute of Marlebridge, cap. 24. and the Statute Articuli super Chartas, cap. 18. by which statutes it is evident that a waste does lie for warrens, and a warren is more than a liberty, for a writ lies *Quære warrenam suam intravit;* and by the 12 H. 8. if lessee of a warren does break the pale, it is a waste. Also if lessee of a pigeon-house stop the holes, so that the pigeons cannot build, a waste doth lie, as it hath been adjudged. Also if lessee of a hop-yard ploweth it up, and sows grain there, it is waste, as it hath been adjudged. Also the breaking a weare is waste, and so of the banks of a fish-pond, so that the water and fish run out. To all which cases the court agreed, except to the principal. For the court held it was not waste to destroy coney-burrows, for waste will not lie for conies, because a man hath not inheritance in them, and a man can have no property in them but only possession, and although by a special law, keepers are to preserve the land they keep, in the same plight they found it, yet this does not bind every lessee of land.—*Walmsley.* The subversion of coney-burrows is not waste, and it was usual to have a waste against those who made holes in land, but not against those who stop them up, because thereby the land is made better. And it was said, that to dig for stones was a waste, unless in an ancient quarry, although the lessee fill it up again. And *Walmsley* said, that in Lancashire it is waste to dig marle, unless it be employed upon the land; and said it was not waste to cut thorns, unless they be in a wood stubbed and digged up by the roots; A. D. 1598.

A. D. 1598. but, if they grow upon the land, then they may be stubbed, and it is no waste. But to cut down thorn-trees that have stood sixty or a hundred years, it is waste.

A. D. 1600.

Bellew v. Langdon. Cro. Eliz. p. 876. 43 Eliz.

Conies are beasts of warren, and a commoner cannot justify driving them away, or killing them, or destroying their burrows, damage feasant. Owen, 114. 1 Jones, 12. 1 Rol. Ab. 405. 1 Sid. 251. Yelv. 105. 143. Cro. Jac. 195. 229. Lut. 108. 3 Bl. Com. 237. 2 Wils. 54. 1 Term Rep. 334.

Trespass for breaking his close, and killing there two hundred conies. The defendant justifies, for that he there had common appurtenant to such an house by prescription; and because the conies were there damage feasant, he killed them. And it was thereupon demurred.—*Godfrey*, for the plaintiff. That it is not any plea; for the owner of the soil hath interest in them against all strangers, and the commoner hath nothing to do but to take his common with the feeding of his cattle there, and he ought not to destroy the profit which the owner hath therein; and as the owner of the soil may have other cattle there, so he may have conies, and may make fish-ponds, and the commoner cannot destroy them. 22 Hen. 6. pl. 59. 3 Hen. 6. pl. 55. And for this point in question, it was adjudged 29 Eliz. in Old v. Cony in this court, that a commoner cannot justify the killing of conies there, &c.—*Wyat*, *è contra*, that it is a good plea; for the commoner hath no other means to help himself but by killing them, for they be harmful to his common, and dig and undermine the soil, and take from him all the benefit of his common, if he suffer them to increase; and they are such creatures whereof no man hath a property; and being esteemed as harmful beasts, the commoner may well kill them, as he may kill foxes or other vermin. But all the court, Popham absente, resolved, that the plea was not good, for the coney is a beast of warren, and profitable as deer are, and are not to be compared to vermin; and therefore the keeping of them by the owner of the soil is lawful, and the killing them unlawful, and not justifiable. And it was adjudged for the plaintiff.

See the case of Cooper v Marsh, 1. Burr. 259.

Eliz. Saville's Reports, 58. A. D. 1600.

The king is entitled on the death of a bishop to have one of his kennel of hounds, &c.

It was clearly held by the officers of the queen's Exchequer, that she should have by her prerogative, after the death of every bishop, a palfrey, a basin and a ewer, and a kennel of hounds. And a process was issued against the administrator of the bishop of Litchfield and Coventry. It appears from what was said, that he compounded.

Holland v. Heale. Noy's Reports, p. 108. 1 *Jac.* 1. A. D. 1603.

A libel in the Spiritual Court for the tithes of pilchards taken in the sea; and now the party had a prohibition, upon a surmise that the custom there is, that the owner of the fisher-boat hath one moiety of the fishes, and the fishermen the other moiety; and that the owner hath used to pay the tenth of his moiety in discharge of all, &c. And it was held by the court to be a good surmise. For by the common-law the parson cannot have the tithes of fishes taken in the sea, because it is not within any parish. And then when the parson, by the custom, ought to have the tithes of them, he ought to take them according to the custom. And that the tenth of the moiety may be a good discharge of the whole. And the parties went to issue upon the custom in Cornhill.

Sharpe v. Sharpe. Noy's Reports, p. 148.

A prohibition was prayed upon a suit in the Spiritual Court for tithes in kind of a park now converted into tillage, upon a surmise *de modo decimandi*, to pay a buck and a doe for all tithes. And allowed by the court and agreed.

1. Although that they are *ferœ naturæ*, yet they may be given for tithes. So to pay feasants, &c.

2. Although they are not tithable of themselves, yet they may be given for *modus decimandi*; as a great tree may be given for tithe of trees tithable.

3. That that is a discharge to the very soil, and the

A. D. 1603. park is not but a liberty, and the owner may furnish it with game, when he please. But after a consultation was granted, because the surmise was not proved within the six months. So adjudged, H. 6 Jac. C. B. the vicar of Clare in Suffolk, who sued for hops. And there also a prohibition was granted upon such a surmise. But after a consultation was granted in that case. For the *modus decimandi* was alledged for discharge of tithes of hay and herbage, and not of all tithes, where the libel was for tithes of hops. And Cook, Chief Justice, vouched one Shibden's case, That such a *modus decimandi* generally for the park, is not good, if it be disparked. But it shall be particularly for all acres contained in the park.

A. D. 1604. *Wadhurst v. Damme. Cro. Jac. p.* 45. 2 *Jac* 1.

In trespass a justification, if the cause of it be local, need only traverse the place in which it arises.—A warrener may justify killing a mastiff dog in the warren, to prevent his destroying the conies.—2 Roll. Abr. 567. Co. Lit. 282. 1 Saund. 84. 3 Lev. 28. 35. 1 Sid. 336. Lutw. 1494. Cro Car. 487. 1 Com. Dig. 607. 4 Bac. Abr. 79. 5 Bac. Abr. 174. 268.

Trespass; for that at Etonbridge, in the county of Kent, he killed his dog, being a mastiff dog. The defendant pleads, that Sir Francis Willoughby was seised in fee of a warren in D. within the same county, whereof he is and then was warrener, and that his dog was divers times killing conies there; and therefore he finding him there, *tempore quo*, &c. running at conies, he there killed him, *absque hoc* that he is guilty at Etonbridge prout, &c. And it was thereupon demurred,

First, Because he traversed the place only, and doth not traverse all other places.

Secondly, For the matter of the justification.

But all the court held, that the traverse was good when his cause of justification is local, and that he needed not alledge any more than that place. Also that the matter of justification is good; because it being alledged that the dog used to be there killing conies, is good cause for the killing him, in salvation of his conies; for, having used to haunt the warren, he can

not otherwise be restrained.—*Yelverton* doubted thereof, because it is not alledged that the master was *sciens* of that quality, or had warning given to him thereof.—*Popham*. The common use of England is, to kill dogs and cats in all warrens, as well as any vermin; which shews that the law hath been always taken to be, that they may well kill them: so the justification is good.—Wherefore it accordingly was adjudged for the defendant. A. D. 1604. Dougl. 747. See 22 and 23 Car. 2. c. 25. 5 Anne, c. 14. s. 4. 3 Geo. 1. c. 11. and 16 Geo. 3. c. 30. s. 9.

Molineux v. Molineux. Cro. Jac. p. 146. 4 *Jac.* 1. A. D. 1607.

It was moved, that an ejectment lies not of a piscary; and it doth not appear in what vill the piscary is, and damages are entirely given.—The court as to this point was doubtful; but to avoid question therein, the plaintiff released his damages totally, and his action *quoad* the piscary, and had his judgment for the residue.* The like judgment was given this Term in another action concerning the same title, where the same special verdict was found, between Fretchvile v. Molineux; but none of these exceptions were taken therein. Wherefore it was adjudged for the plaintiff. An ejectment will not lie for a piscary. 1 Roll. Ab. 784. Yelv. 143. Co. Lit. 5. 8 Mod. 277. Dougl. 305. 1 Ter. Rep. 11. See the point adjudged on a writ of error, Cro. Car. 492. See also 1 Lev. 212. and Sid. 416. that it will not lie *de pannagio*.

* As to this point, see 1 Roll. Abr. 784. 2 Bulst. 28. 3 Leon. 128. Style, 30.

Lady Russell v. Earl of Nottingham. 4 *Jac.* 1. *Moore Rep.* 787. *A. D.* 1607.

In the Star Chamber, it was agreed by the judges in this case, that if the keeper of a park cuts down the trees, or takes in so much of the herbage for agistment, that he does not leave sufficient for the deer, he forfeits his office. So too if a man has the herbage of a park, and surcharges the park with so many cattle that the deer have not sufficient sustenance, he is a trespasser. Park-keeper forfeiture of office.

The Case of Leicester Forest. Cro. Jac. p. 155. A. D. 1608.

Note. This term all the justices and barons met at The twelve

A. D. 1608 Judges are to be king's counsel for matters of law. 3 Inst. 125. 1 Bl. Com. 229. 12 Co. 22. b. Jenkin's 7th Century, p. 316. S. C.

Serjeants' Inn to confer of matters upon the following questions concerning the forest of Leicester, by the king's command; the forest being the king's, in right of his duchy of Lancaster.

First, Whether the owners of woods in a forest or chase, in the hands of a subject, may fell them at their pleasure without licence, and keep them incoppiced as long as they please?

Secondly, whether the owners of land within such forest might erect lodges for warrens, or make coney burrows, or keep sheep there?

Thirdly, Whether they who affirm that they have parks within such a forest by charter or prescription which have lain open for forty years or more, may now enclose them, and keep them enclosed as parks?

Fourthly, Whether deer coming out of the forest into such enclosed grounds may be killed by the owners of such grounds?

And upon these question, the counsel of both parties being there,

A forest is subject to the forest laws, but not a chase; and both may be granted to a subject. Co. Lit. 233. a. 4 Inst. 293. 301. Manw. 40. Palm. 60. 92. 12 Co. 22.

First, They all held, that a forest may well be in the hands of a subject, and shall be used as a forest, if the king gives authority by express words, for the administration of justice there, and for his justices to come there; and if such grantee might have commission in such cases to use and have officers of a forest, then shall continue a forest in the hands of a subject; otherwise, without such liberties, it is but a chase, being in the hands of a common person. And Popham said that he had seen such liberties of a forest granted in that manner.

The trustees of a forest or chase may fell the wood without notice to the forester. 4 Inst. 298. 2 Bl. Rep. 927.

Secondly, they all held, that in such forests or chase (being in the hands of a common person), those who are owners of woods may cut them down at their pleasure without licence or view of the foresters, but yet in such manner as they ought always to leave sufficient vert for the deer there.

A. D. 1668.

Thirdly, They all held, that they may prescribe to have warrens, or to keep sheep in forests, although they were in the king's hands; but without a special prescription it cannot be: and in such case of prescription for warren, although it had not been used for divers years, if he had it by grant, or can prove it by prescription, a *non user* is no cause of forfeiture thereof. —But Sir Edward Coke said, it had been adjudged*, that the *non user* of a fair or market, or courts, or such like liberties, wherein the subjects have interest for their common profit or common justice, is cause of seizure of them: but the *non user* of parks or warrens, or such like, which are to the profit only or pleasure of the owner, is not any cause of their loss or forfeiture. And he said, it was adjudged about 18 Eliz. in the case of Lord Hatton in the King's Bench, upon demurrer, that one might well prescribe to cut down his woods in a forest, being in the king's hands. Which Popham affirmed; but said, it was adjudged otherwise about the same time in the Exchequer. Also they held, that if one hath a warren or charter in all his manor, he may erect a lodge, or make coney-burrows in any place of the manor at his pleasure: but if he claims it by prescription, he ought to make the coney-burrows in such places wherein they have been used, and not in others.

Jenkins, 316. S. C. Warrens and sheep-walks in the king's forests may be prescribed for, and they are not forfeited by *non user*; but the *non user* of fairs, markets, or courts, is a cause of forfeiture, for the subjects have an interest in their being held. Post. 454. Co. Lit. 2. a. 114. b. 4 Inst. 298. F. N. B. 230. 2 Roll. Abr. 271. 2 Inst. 19. 2 Hawk. P. 3. 114. A person who hath free warren by charter may erect a lodge, or make burrows in any part of the manor; but if by prescription, in the usual places only.

Fourthly, They held, that parks being laid open to forests for forty years, may yet be enclosed again; and they may kill any deer which come therein.

4 Inst. 298. Cro. Car. 311. Parks laid open to forests may be enclosed again.

Fifthly, That enclosures cannot be in forests or chases unless with low hedges, which may not disturb the game. And although enclosures have been continued for forty years together, if they were not before, that they may well be destroyed and laid open.

Forests and chases cannot be enclosed.

* See Mr. Hargrave's note (15) Co. Lit. 118. See 2 Com. Dig. tit. "Chase."

A. D. 1608.

Jenkins's Eighth Century, p. 316. case 6.

5 Jac. S. C. Cr. 155. Case de Leicester Forest. Forest, Prescription, *Quo Warranto*. By all the judges. 1 Inst. 233. Co. Lit. 115. a. 2 Cr. 155. 4 Inst. 298. 1 Cr. 311.

A subject may have a forest by the king's grant, if the king grants that he shall have the officers necessary in forests, for the administration of justice, by special words; otherwise it is only a chase. The owners of wood in a forest may fell wood without licence, or view of a forester; but they ought to leave sufficient vert for the deer. A prescription to have a warren there, or to have common for sheep there, is good. A non-user for forty years of parks or warrens claimed by prescription in forests, is not a good cause for seising them; it is for fairs or markets. If a park within a forest be disparked for forty years, being a park before, it may be enclosed, and shall be reputed out of the forest: and if enclosures within a forest continue for forty years; yet, if they were not before, they may be demolished. Enclosures in forests ought to be with a small hedge and ditch, so that the game there may not be hindered to range.

Hadesden v. Gryssel. Cro. Jac. p. 195. 5 Jac. 1.

The lord of the soil may make burrows to a common, and stock them with rabbits; and therefore a commoner cannot justify chasing them there as damage fesant; but if the lord surcharge the common he may have an action for the disturbance. Yelv. 10. 113. and Bro.

Trespass; wherefore he broke his close, called "The Heath," at Layton Bussard, the 11th December, 4 Jac. 1.: *necnon* the same day, *liberam warrennam* of the plaintiff's at Layton *prædict. intravit*, and took, killed, and carried away conies. The defendant pleads to all the trespass, except the entry into the close called "The Heath," not guilty: as to that he justifies, for that he was seised in fee of a messuage and land, and had common by prescription appertaining thereto, in the place where, and that he was ready to use his common; and many conies being there damage feasant, and spoiling the grass, he entered to chase them out, lest they should increase, &c. Whereupon the plaintiff demurred.—After argument, the court adjudged, that the plea was

not good; for a commoner hath nothing to do with the land but to put in his cattle, and may not meddle with any thing of the lord's there; and as the lord may have great beasts there, so he may have beasts of warren, and the commoner cannot destroy them. F. Nat. Br. 121. And if the lord, by reason of them, should surcharge the common, and deprive him of his common, he ought to have his remedy by assise, or action upon the case; but he may not kill the conies, no more than he may kill any other beasts of the lord's; and so long as conies are in the lord's own land, the lord hath property in them, and may say *cuniculos suos* (*a*); but when they go out, he hath no longer property in them. 22 Hen. 6. pl. 59. 10 Hen. 6. pl. 13. 46 Edw. 3. pl. 2. 3 Hen. 6. pl. 55.: and therefore they being in the lord's land, the commoner may not meddle with them; nor ought he to come there but to use his common: then when he shews that his intent was to enter to chase the conies, that entry is tortious. Wherefore it was adjudged for the plaintiff.

A. D. 1608.

C. Gould, 208. 1 Roll. Ab. 405. F. N. B. 86. Cro. Car. 388. 2 Leon. 201. 1 Mod. 39. Cro. Eliz. 863. 1 Sid. 251. Lutw. 108. 3 Bl. Com. 240. 1 Burr. 262.

(*a*) 3 Lev. 227. Post 262. Cro. Car. 553. 1 Roll. Ab. 403. 7 Co. 17. Com. Rep. 34. 1 Salk. 556. 1 Ld. Ray. 250. 4 Burr. 2427.

Note, At the first motion the court was of opinion against the plaintiff, that a commoner might destroy conies, for they are *feræ naturæ*. But afterward, upon better consideration, and upon view of a precedent between Bellew and Langdon (*b*) in this court, and for the reasons before recited, all the justices, upon the second motion, adjudged for the plaintiff; and it was resolved accordingly.

(*b*) Cro. Eliz. 876. 1 Roll. Ab. 405. See Cooper v. Marshall, 1. Burr. 259. 266. 2 Wils. 54.

Gresill v. Hoddesden. Yelverton's Reports, p. 143.

A. D. 1609.

Case. Coney-burrows, &c. made in the father's time, and continued in the heirs.

Robert Gresill, the plaintiff's father, was seised in fee of an house and 1000 acres of land, &c. and he and all they whose estate, &c. have had for them and their farmers common appurtenant for all cattle, levant and couchant in a place called The Heath, within the manor of Leighton Bussard, as appurtenant to the messuage,

2 Roll. Rep. 346.

A. D. 1609. &c. The defendant, owner and lord of the mano erected an hou e on the common, and also made coney burrows in the said common, called The Heath. Ro bert died, whereby the messuage, &c. descended to th plaintiff, and he brought an action on the case again the defendant for erecting the said house, and makin the coney-burrows in the time of his father; and de clared, that by the increase of the conies in thos burrows the plaintiff had lost his common after th death of his father. And, per Curiam, the action we lies; for although the defendant has not made any ne erection, nor new burrows in the plaintiff's time, yet h suffering the conies to increase, and the house to stan is a new tort to the heir, for which he may have a action, like the case 15 El. Dy. 319. where the turnin of a cock for the water and using of it, although was set and fixed long before, was adjudged a new dive sion. Yelverton of counsel with the defendant.

Cro. El. 402. 3 Leon. 174. Salk. 460. Lilly Entr. 82.

A. D. 1610. *Sir Jerome Horsey v. Hagberton. Michaelmas Tern 7 Jac.* 1. *Cro. Jac. p.* 229.

A commoner cannot destroy coney-burrows made in the common. Ante, 195. 2 Bulst. 116. 2 Mod. 66. 1 Bur. 262.

Trespass. Upon demurrer, the question was, Wh ther a commoner may cast down and fill up coney-bu rows which were made in the common waste where l was to have common?—And this being pleaded in ju tification, and demurrer thereupon, it was resolved ar adjudged, without argument, that the commoner ha not any other interest than to take the common by t feeding there of his cattle, and may not destroy the c nies nor coney-burrows. Wherefore, without argume it was adjudged that the plea was not good.

A. D. 1611. *The Case of the Royal Piscary of Banne*, 8 *Jac. Davy's Reports*, 55. *A. D.* 1611.

In the river of Banne in Ulster, which divides th county of Antrim from the county of Cohaine, about tv

leagues from the sea, where there is a navigable stream, A. D. 1611.
there is a rich piscary of salmon, which was part of an ancient inheritance of the crown, as appears from many pipe-rolls and surveys, where it is found to be a several piscary, but now is granted by the king to the city of London in fee-farm. The profit of this piscary, for the space of 200 years since, was shared among the Irish lords, who invaded and seized on the possessions of the crown in Ulster, and forcibly kept possession of the territory adjoining the said river of Banne, even to the 1st year of our present sovereign lord the king.

In the 1st year of James, Sir Randal M'Donel obtained a grant to him and his heirs, by letters patent, of the territory of Rout, which is parcel of the county of Antrim, and adjacent to the river Banne, in that part where the said piscary is, and has ever been. In the letters patent the king grants to him "all castles, messuages, tofts, mills, dove-houses, gardens, orchards, lands, meadows, grass grounds, pastures, woods, underwoods, rents, reversions, and services, fisheries, fishings, waters, and water-courses, &c. and all other hereditaments in or within the said territory of Rout, in the county of Antrim, excepting and reserving to ourselves, heirs and successors three parts of the fishing of the river of Banne."

Upon this grant Sir Randall Mac Donel petitioned the lord-deputy for quiet possession of the fourth part of the said piscary, which at that time was sequestered by a special order of the council-table. The lord-deputy being advised by the attorney-general, That no part of that piscary passed to Randall M'Donel by the grant, took the opinion of the chief judges, being of the privy-council; who, in view of many pipe-rolls in which this piscary is found as several, by inquest as parcel of the ancient inheritance of the crown, and on consideration of the grant so made to Sir Randall M'Donel, certify

A. D. 1611. their opinion and determination, That no part of the said piscary passed to Sir Randall M'Donel, by the aforesaid letters patent. And in this case many points were raised and determined.

First. That, although the rule of the civil law is, "That rivers and ports are public property, and therefore every one has a right of fishing in ports and rivers," as is laid down in Bract. lib. 2. cap. 12. yet by the common law of England a man may have a proper and several insterest, as well in the water or river as in a piscary; and by this a water can be granted, 11 R. 2. Plo. Comment. 154. a. If one grant to another his water, the piscary will hereby pass, because it is included in the word "water." And in N. Brev. 123. the quod permittat lies in free fishery in this form; "Command A. that he permit B. to have free fishery in the water of A. in N." Which shews that A. had an interest in the water.

Piscary also lies in grant, and in tenure, and by grant of this the soil passed. For in the 40th year of Edward 3. 45. the Monstraverunt lies for a fishery, that it contains the land and demesne: for otherwise a distress cannot be taken in it, as it is remarked in Plow. Comment. 154. a. vid. 34. As. p. 11. A grant of fishery in the rever Tese to the abbot of Rivaux, save the mill-pool. Also a piscary is demandable by præcipe, N. Br. fol. 2. c. And assise lies for a fishery, N. Br. 179. I. for a man can have an estate of freehold in a piscary. Fitz. Ass. 422. in the reign of Edw. I. in an assise of nuisance, the plaintiff complains, that by the raising of a dam, he is disturbed of his fishery; exception was taken to the count, that no freehold was thereby assigned, to which a piscary was appendant, and there it is said that piscary is a freehold in itself, in which there is no occasion to shew to what freehold it is appendant.

See also Fitz. Ass. 427. 12 Hen. 3. An assize of free- A. D. 1611.
hold, " and complains of a piscary and recovers. Also a man can make a bailiff of his piscary, 11 Hen. 7. 20. a. 10 Hen. 7. 24. b. Nat. Brev. 88. h. Vide also 23 Hen. 3. Brook Ass. 450. and 34 Ass. pl. 11.; and again tithes are due from the produce of rivers, Linwood, fo. 101. (as yet fish was not offered in sacrifice, Tho. Aquin, 1. 2. 2. 102.) and there is a Note in Linwood above, that says, " A river is a constant flow of water, but the streams is properly the water itself. And the gloss of this rule of the civil law above mentioned is this: the stream itself, unless it change its source, always remains in the same place, but the running water is common, because it does not remain, but runs to a distance beyond the boundary of its stream, till at length, perhaps it reaches the sea.

Secondly. There are two species of rivers, the navigable and not navigable; every navigable river, so high that the sea flows and reflows into it, is a royal river, and the fishery in it is also a royal fishery and belongs to the king by his prerogative: but in every other river, not navigable, in the fishery of such river the terræ tenants ex utráque parte, have of common right an interest. The ground on which the king posseses an interest in navigable rivers, where there is a flux and reflux of tide, is that such river partakes of the nature of the sea, and is called a branch of the sea, so far as it flows, 22 Ass. p. 93.—8 Ed. 2. Fitz.—Tit. Corona, 399. The sea also is not only under the dominion of the king, as is said, 6 R. 2. Fitz. Protection, 46. " The sea is of the king's legeance, as of the English crown: but is also his own proper inheritance, and by it the king shall have the land which is gained out of the sea, Dyer, 15.—Eliz. 226. b.—22 Ass. p. 93. The king also shall have the great produce of the sea, whales, and sturgeons, &c. which

A. D. 1611. are royal fish, and no subject can have them without special grant of the king Prærogative. Regis, c. 11. Stanford, 37, 38. Bracton, lib. 3. c. 3.—39 Edw. 3. 35. a. And the king shall have wild swans as royal volatilia over the sea and its branches. The case of the swans in the Seventh Part of Lord Coke's Reports. So wreck of the sea is a royal perquisite, 5 Coke, 107. Sir Henry Constable's Case; and upon this account before the Stat. of 18 Edw. 3. no subject can pass beyond the sea, without special leave of the king; but it is there enacted that the sea is open to all merchants. And all ports and havens which are the doors and gates of the kingdom, appertain to the king, inasmuch as he is the keeper of the whole realm. and Fitz. Nat. Br. 113. a. The king is bound of right to protect and defend his realm, as well against the sea as against his enemies, and that the king has the same prerogative and interest in the branches of the sea, and navigable rivers where the tide flows, as over the high sea, is manifest by many authorities and records; as,

1st, The king by his letters patent makes the high admiral of England, and grants to him not only jurisdiction and power to decide maritime causes, but "all goods, waifs, flotsam, litzain, and ligan, and all goods, merchandizes, and chattels lost in the sea, or cast without the sea, and all and every casualty as well upon the sea or shores, creeks or coasts of the sea, as in or upon fresh waters, ports, streams, rivers, or other places, whatsoever, covered with water, within the flux or reflux of the sea or water at high tide, from whatsoever arising, happening, or coming from the farthest bridges throughout the kingdom of England, Ireland, &c.

2. A commission of sewers which was issued by the king, in virtue of his royal prerogative, before any statute in that case provided, extends not only to the shores and banks of the sea, but also those of navigable

rivers and fresh water.—Regist. fo. 127. a. b. N. B. 113. a. And it is recited in the Stat. of 25 H. 8. c. 10. that the king by reason of his dignity and royal prerogative, ought to provide that navigable streams are rendered passable, &c. A. D. 1611.

3. The city of London by king's charter had the grant of the River Thames, but because it was held that the soil and bottom of the river did not thereby pass, they purchased another charter, by which the soil and bottom were also granted; by means whereof the city now receive rents of those who put down posts or make wharfs or other buildings upon the ground of the said river.

4. Among the Pleas of the Crown, 40 E. 3. in the Chief Chamber of Dublin Castle, there is an entry, "Our Lords the Sovereigns of England and Lords of Ireland, in right of the crown, have over all the water of the Boine from the town of Droghedah as far as Trim, a portion of the water commonly called the Watershard, containing in breadth twenty-four feet in the deepest part of such water, so that boats and vessels, &c. may pass and repass through the aforesaid pass, without interruption, &c. and there a judgment is entered in the same roll, 'That a weir made by the Abbot of Mellefont in the said river, should be abatted, and a fine imposed on him," &c. And this agrees with Glanvill, who says, that a perprestur may as well be made in royal waters as royal roads. See 19 Ass. p. 6. That the River Lee is found on inquisition the high stream of the king; and also, 1 & 2 Ph. & Mar. Dier, 117. a. The Thames is called the King's stream, and in the Stat. 28 Hen. c. 22. passed in this realm, the rivers Barrowhoir and Suir are called the King's rivers, and the weirs erected on them purprestures, and although the king permits his subjects for their ease and advantage to have free passage on such navigable rivers,

A. D. 1611. he has notwithstanding a sole interest in the soil of those rivers, and also in the fisheries, although its produce is not generally taken and appropriated by the king, if no of extraordinary and fixed yearly value, as the piscary of Banne has ever been.—Observe in the case of the swans, 7 Co. 16. a. the king, Hen. 8. granted to Strangewaies, all that free fishery called the Fleet, in Abbotsbury, which is a bay or creek of the sea, and al though the abbot had the piscary previous to the disso lution, it is to be understood that the abbot had this ori ginally by grant of the king, being a several fishery upon an arm of the sea, and consequently a royal one. Se Plo. Com. 31. 5. b.

So it was determined, That the River of Banne, lik the sea, having a tide, is a royal river, the fishery o salmon there a royal one, which appertains to the kin, as a several fishery, and not to them who have the soil o either side of the stream.—But on the other side it wa agreed, That every inland river, not navigable, appur tains to the owners of the soil where it takes its course 28 Ass. p. 93.; and if such river run between two ma nors, and is the meet and boundary between them, on half of the river and fishery belongs to one lord, and th other half to the other. And this appears from Lib. In trac. fol. 666. b. In "Trespass wherefore he fished i a separate fishery, and took thence, to wit, two salmons &c. Defendant pleads, That he was seised of the ma nor of B. which extends the whole length of the water o W. which is the same fishery in which it is alledged that the aforesaid fishing was had, on the south side.' And that the plaintiff, at the very time in which, &c was seised of the manor of A. with its appurtenants which extends to the middle of the channel of the said water, on the north side of the aforesaid water, and th aforesaid manors extend equally from the east to th west, and that the defendant himself, and all those who

have held that estate from time immemorial, were seised on the south side of the said water, as of their several piscary, as parcel of the aforesaid manor, and in like manner had common of piscary on the aforesaid northern side of the same water, appertaining to the aforesaid manor of A.; that the aforesaid water on each side has its several piscary, without this, that the defendant had common of piscary on the north side. See 2 R. 2. f. 5. which writ "*De rationalibus divisis*" lies for such a fishery. A. D. 1611.

3. It was determined that no part of that royal fishery of Banne can pass by the grant of the land adjoining, by a general grant of all fisheries, for that royal fishery is not appertenant to the land, but is a fishery in gross, and parcel of the inheritance of the crown itself: and general words of grant from the king shall not pass such a special royalty, which appertains to the crown by prerogative, just as royal mines, royal fines, royal escheats, will not pass by the general terms of all mines, fines, and escheats. And to this intent are many decisions directly in point, in the Case of Mines.—Plow. Comment. 333. b. 334. a. and 9 and 10 Eliz. 268, 9.

Lastly, it was agreed that where the king has granted to Sir Randall M'Donel, all the territory adjoining to the river, and all the fisheries within that territory, excepting three parts of the fishery of the Banne, that the fourth part shall not pass by the grant, because the grant to the king shall not pass any thing by implication, 2. H. 7. 13, &c.

These points were determined in this case by the rules and authorities of the common law; but divers rules of the civil law, and customary laws of France, agreeable to our law on this point, were cited out of Renatus Choppinus, a writer of great authority, in his treatise "Of the

A. D. 1611. Dominion of France," Lib. i. tit. 16. de fluminibus "There are two kinds of rivers, says he, some rega others or private. Those are termed rega from which the king takes tax by right of patrimony and in which he appoints the manner and season of fish ing.—See Stat. W. 2. c. 47. And not only are the termed regal, because affixed to the dominion of th king, but also on account of kings and princes havin taken upon themselves the care of them, and brough into the Exchequer, as appertaining to the public trea sury, the produce of fisheries and other kinds of re arising from public rivers. There are also public roy lakes the same as the larger rivers; for they let out pul lic lakes, and bring the taxes into the exchequer; an therefore a farmer hiring the taxes of the lake or po obtains an advantageous privilege, if fishing be proh bited. For it is most reasonable to defend him in h privilege in favour of the public taxes."

And as to all other rivers that flow through private land he says, "That by prescription or permission of prince or some other just title, all such rivers are rendered pri vate, though in nature public, and that fishing in a ce tain part of the river may be established on agreemen or acquired by a long and continued use: and so t more powerful inhabitants by the stream, having for great length of time solely used the right to preve others from the enjoyment of the common right; a though no individual can have a right to impose servic on the use of the sea, its source being by nature open all."

He moreover shews "That the ancient kings France prescribed the mode of fishing in the public vers, and brought into the general exchequer the pr duce of the fisheries, and other profits of the rive which at all times were added to the public treasu

For the prerogative of the king in the sea, he cites the verse in Juvenal :— A. D. 1611.

" Quicquid conspicuum pulchrumque ex æquore toto est."

Whatever swims belongs to the exchequer. And *Cujacius de fœdis*, f. 205. a. was also cited, where he says, " public roads are royal and navigable rivers, and those things whence they become navigable, as ports, tributes, money, &c."

Samford and Havel's Case: Godb. Reports, p. 184. A. D. 1612.
Hill. 9 *Jacobi, in the King's Bench.*

In an action of trespass for thirty hares, and three hundred conies hunted in his warren, taken and carried away, which trespass was laid with a *continuando*, from such a time till such a time: the defendant justified, because he had common in the place where, &c. to a messuage, six yard lands for two hundred and forty sheep, and that he and all those whose estate he hath, time out of mind, have used at such time as the common was surcharged with conies, to hunt them, kill and carry them, as to his messuage appertaining: upon which the plaintiff did demur in law, because a man cannot make such a prescription in the free-warren, and free-hold of another man: and secondly, because a man cannot so prescribe to hunt, kill, and carry away his conies, as pertaining to his messuage: but a man may prescribe to have so many conies to spend in his house: and for these causes in the principal case, the prescription was holden for a void prescription; and judgment was given for the plaintiff.

Fishing in the River Thames, 12 *Coke's Reports, p.* 89. A. D. 1612.
Mich. 9. *Jacobi Regnis.*

In this same term the issue in an information upon the statute of 2 H. 6. 15. was tried at the bar, and upon the evidence upon the words of the said act, which are, Rivers. Fish. See Shep. Abr. 210, 211. and Nelson's Just. tit. Fish.

A. D. 1611. that every person which setteth or fasteneth in the rive
of Thames any nets or engines called trincks, or an
manner of nets, to any posts, boats, anchors, or th
like things, to stand continually day and night, forfei
to the king one hundred shillings for every time, &c
and the defendants having set and fastened nets calle
trincks, in the river of Thames, &c. to boats day an
night, for so long time as the tide did serve, and d
not say *continually*.

The question was, if this was within the statut
And it was clearly resolved, that it was within the st
tute: for the nets called trincks, cannot stand but for
long as the tide serves: and for this the word *continual*
shall be taken continually so long as they may stand
take fish, and as the time of fishing endures, be it
the day or night, for *lex non intendit aliquid impossibi*
for otherwise the law should not be of any effect: a
although that it was said, that this statute remains
force, and if any had complained of any offence agai
it, he shall be punished; but the reason why no exec
tion hath been made of this act, was for this, that no
should have benefit by the suit but the king only,
the penalty is only given to the king. And as it do
appear by the preamble in the proviso in the act,
manner of the nets was not the cause of the making
the act, for by the proviso every man may fish in
seasonable time with trincks, if they are of ass
drawing and conveying them with their hands, as ot
fishers do, and not fastening them to posts, boats,
anchors, &c. continually to stand; for the miscl
was by fastening them, and the standing of them co
nually, the brood and fry of fish were destroyed, a
disturbance made to common passage of vessels, a
weirs, lidels, and other engines.

Carrill, plaintiff, against Pack and Baker, defendants. A. D. 1613.
Entered Mich. 10 *Jac. B. R. Rott.* 463. 2 *Bulstrode's Reports, p.* 115.

In an action of trespass, *quare clausam, & liberam warrennam fregit, & intravit*, and for the digging the ground, the defendants plead *non culp.* to part, and justifies in this manner, *s.* that the place where is a place in Harding; that there is a common there called Harding Common, that Sir Edward Carrill, father of the plaintiff, did store this place with conies, and so the same came to Richard Carrill the plaintiff, his son, who had conies there, and made holes; that the sheep of these defendants, and of the rest of the commoners, often fell into these holes, and so were hurt; by reason whereof, these defendants came with ferrets and did chase the conies, and digged down the burrows and filled up the holes, for the better preservation of their cattle, and enjoyment of their common, and so justify: upon this the plaintiff demurred, the only question was, whether this was a good justification or not.—*George Croke* for the plaintiff, that this justification is not good, for the commoner hath no remedy given unto him but to take his common with the mouth of his cattle; and here the plaintiff hath free warren in this place: a commoner is not to disturb the lord of the soil; the remedy which a commoner hath, is an action upon the case, or an assise, it appears 12 H. 8. f. 2 & 3. and 13 H. 8. fol. 15. in Simon de Harecourt's case, that a commoner hath nothing to do but to take his common with the mouth of his cattle; he is not to have an action of trespass: to this purpose, see 4 H. 7. fol. 3. & 15 H. 7. fol. 12. Hillar. 29 Eliz. Old plaintiff, against Cunney: an action of trespass brought against a commoner for chasing in his warren, and killing of his conies, who pleaded that the conies did increase, and so did surcharge the land, and did damage to the commoners, and for this

An action of trespass brought against commoners. 1 Brownl. & G. 217. S. C.

12 H. 8. f. 2, 3. &c.

4 H. 4. f. 3. &c.

A. D. 1613. Pasch. 43. Eliz. B.R. &c.

cause he did kill them: upon this plea the plaintiff d murred in law and adjudged the plea not good, and th the commoner could not justify the killing of the Pasch. 43 Eliz. B. R. Rot. 434. *Bellow*, plainti against *Langdon*, defendant. In an action of trespa brought for chasing and killing of his conies; the d fendant pleaded *non culp.* ruled in that case, that t lord may do as he will with his own soil; he may eitl have deer or conies there, and the other cannot k them, and so it was ruled against him, Coke, 5 pars, fl 104. in Boulston's case. If a man make coney-burro in his own land, which increase to so great a numb that they hurt the land of his neighbour next adjoinin he cannot for this have an action upon the case, but soon as they come upon his land, he may kill them la fully. Here they justify the hunting and digging do the holes, this justification is not good, and so the pla tiff to have his judgment. Sir Robert Hitcham for t defendants, that the justification is good, and that authority in law. The cases before remembered w for killing, which must be agreed could not be justifie but the chasing there never came in question, 12 & H. 8. not ruled there, but only controverted, and t against two. The chief justice, there for the commone the difference will be, where a commoner doth interme dle with the soil *de novo*, and where he only reform misfesance, 13 H. 8. there he meddled with the soil *novo*; if the ter-tenant do enclose, the commoner m pull the same down again, for this only so done, to r form what was done. If the lord do make a pond the common, if the commoner, notwithstanding this ha common sufficient, this is good; but if all the comm be taken up in the pond, they may well then let out t water, and so enjoy their common, and this they m justify in 13 H. 8. there the commoner meddled wi the soil *de novo;* and though this was to drain aw

the water, and so thereby to meliorate the common, yet in this the court there was divided two against two, so that a commoner may reform that which is amiss, and to the prejudice of the common, but not to meddle with the soil *de novo*. Again as this case is, the ter-tenant shall not take any advantage of this his own wrong; as if a man takes the goods of I. S. and carries them upon his own land, I. S. may well justify his entry upon the land, to take his goods, and shall not be punished for the same in an action of trespass, and that it shall be lawful for one to remove what is hurtful and a damage to him; to this purpose is 8 E. 4. fol. 5. & 9 E. 4. 35. which come to the reason of this case now in question.—*Haughton*, Justice. The action of trespass here is brought for this cause, *s. Quare warrennam fregit, &c.* The defendant by way of justification, shews that he was a commoner, that he digged down the coney holes; and filled them up again, without confessing or avoiding of the trespass, and so the plea not good. —*Dodderidge*, Justice. By prescription, or by grant of the king, a man may have a warren. If one which hath no warren, do put conies into an enclosed ground, he cannot here have an action of trespass, *quare warrennam, sed quare clausum fregit.* Here the action of trespass is, *quare clausum & liberam warrennam fregit, & intravit*, he pleads *non culp.* and justifies; and so by this he confesseth that he hath a free warren.—*Croke*, Justice. If the plaintiff hath a warren, the defendant cannot justify the killing of his conies.—*Haughton*, Justice. Coney-burrows are incident to a warren.—*Dodderidge*, Justice. If the defendants had pleaded *non culp.* to the trespass in the warren, this had been then well pleaded, and the plaintiff must then have made it to appear unto the court, that he had a free warren; but here by this plea they have confessed, that he had a free warren. If the king doth grant unto I. S. free warren in his land, A. D. 1613.

A. D. 1613. afterwards I. S. makes a feoffment in fee of this land excepting the free warren, I. S. may clearly afterward make coney-burrows in this land *de novo*, and store th same with conies. A commoner may well distrain th cattle of a stranger, being upon the common: but not s the cattle of the lord, neither may he chase them, thoug they surcharge the common; and he said to the counse for the defendants, that this last case doth make the de fendant's case here to be without any great questior and so the court was clear of opinion, that this plea an justification of the defendants was not good, and so b the rule of the court, judgment was given, and so enter ed for the plaintiff, if better cause by a day given wa not shewed the contrary; but no cause being shewec the judgment did stand.

Judgment given for the plaintiff.

A. D. 1614. *Gedge, plaintiff, against Minne, defendant. Trin. 1 Jac. Br. Rot.* 1034. *2 Bulst. Reports, p.* 60.

In trespass for breaking and digging his ground, justifies the digging for a badger. Cro. Jac. 321. 1 Brownl. & G. 224.

In an action of trespass, *pedibus ambulando*, &c. an for breaking and digging the land of the plaintiff; th defendant pleads in bar, by way of justification, an sets forth, that the common voice, and fame was, *quo quædam melis*, a noisome vermin called a badger, wa there, and had done very much hurt, and that therefor he came with his dogs, and did hunt him, and in pur suit thereof, *& ad melem prædictam interficiendam*, he di follow him with his dogs, and did earth him in the plain tiff's ground, and there he came, and digged him ou of the ground, and killed him, and this he pleaded b way of justification, *quoad le trespas, fractionem, loci prædicti fossionem, & fossam, cum terra prædicta im plevit.* To this plea in bar, the plaintiff demurred i law. It was urged for the plaintiff, that this justifica tion was not good, though it be here alledged, that th common report was, that there was a hurtful badger and that he came *ad interficiendam*, and that he di thereby as little hurt as he could possibly; yet this i

not sufficient to justify this act of digging by him. At the common law, a man was to be punished for hunting, as appears by the book of 12 H. 8. fol. 10. a. These statutes were made in allowance of hunting. The first statute was 13 R. 2. cap. 13. for the allowing of hunting, not to hunt unless he have lands to the value of forty shillings *per annum*, or be otherwise especially licensed to keep dogs; another statute made 8 Eliz. cap. 15. for destruction of vermin, of foxes, grey, or badger, and a reward given to those that shall destroy such vermin, if he might enter on the ground, for to kill the badger, yet he cannot justify the digging, for that he might use other means to kill him, and then not to dig the ground for him, and here he hath not averred, that he could not otherwise kill him. Against this it was urged for the defendant, that this justification is good, in regard that all which is here done, is for the good of the commonwealth; here it is laid, that the common fame was, that there was a badger, a noisome beast, that he did hunt him, and earthed him in the plaintiff's ground, and did dig him out, and so killed him, *quæ est eadem transgressio unde, &c.* the badger is a beast naturally inclined to do mischief, this differs from the other cases of hunting for pleasure; here it is said the common voice or fame was so; this is sufficient without shewing any hurt done, 2 Hen. 7. fol. 15. In an action brought for a false imprisonment, he ought there to shew, that there was a felony done, and that the party taken was of an ill name, in many cases matter of necessity makes a good justification. 6. E. 4. f. 7. A man cuts down trees, and they fall in another's ground, he may enter and take them, this being a case of necessity. 3 E. 6. Dyer, and 7 Eliz. Dyer, in time of war, the enemies break a prison, let the prisoners out, this is no escape in the gaoler; for this was not to be avoided: to make bulwarks in time of war, to keep the country in quiet, this is lawful;

A. D. 1614.

12 H. 8. fol. 10.

Statute of 13 R. 2. c. 13.

Statute of 8 Eliz. cap. 15.

2 H. 7. fol. 15.

6 E. 4. f. 7.

3 E. 6. Dyer. & 7 Eliz. Dyer.

A. D. 1614. and so to prevent mischief if the house be on fire t
pull down the next; these and such like things may b
12H. 8. fol. 2. done in cases of necessity, as appeareth by 12 H. 8. f. 2
13, &c. 13 H. 8. f. 15. 21 H. 7. f. 27. 29 H. 8. Dyer 37. Mal
vert's case, &c. 8 E. 4. f. 23. and Coke, 5 pa. 92. i
Semayne's case, for the taking of felons, for the good
the commonwealth, it is lawful to break the house
another, and all which was done here, was for the gen
2 H 4. f. 12. ral good of the country, and so is 2 H. 4. fol. 12. suc
a justification for breaking a house held good, and so
1 H. 7. f. 6. is 1 H. 7. fol. 6. if a man sell to another his timber tre
in such a wood, the law gives him leave to come wit
his carts, and cut them down and to carry them away
the difference will be, where a man hath other means t
5 E. 3. Fitz. effect what was done, and where not, as in 5 E. 3. *tit*
&c. *trespass placito*, 13. Trespass brought for breaking of
gutter, pleads that he did this, to come to repair th
house, and this held a good plea. Here this badger wa
a hurtful vermin, and he came to kill him, and so did b
12H.8.fol.10. digging him out of the earth. 12 H. 8. fol. 10. expres
in point, that for hunting of vermin offensive and hur
ful to the commonwealth, no action of trespass lieth
and that for this reason, the same being for the good
the commonwealth; and here he had no means to get th
badger out, and so to kill him, but by digging him out
Statute of the statute of 8 Eliz. cap. 15. makes provision for de
8Eliz.cap.15. stroying of hurtful birds and fowls, and gives a rewar
for the same, and so for foxes and badgers, the la
finding them to be offensive and hurtful, and the la
did never intend otherwise, but to give, and allow of th
means to take them, otherwise it were but in vain to giv
a reward to the takers of them, if by law they should b
punished as trespassers, for using the means to take an
kill them, as was only so done in this case, as to th
Statute of statute of 13 R. 2. cap. 13. this was for hunting. Th
13R.2.cap.13. plaintiff doth not here charge the defendant for huntin

upon the statute, but for walking and digging: all that here was done by the defendant, was for the good of the commonwealth; and so the justification good.—*Haughton*, Justice, demanded, Whether in the putting of the case they pleaded a continuance of the trespass or not: Not guilty pleaded to all but digging, and that is justified, the justification here is not good.—*Dodderidge*, Justice. It is not lawful by the common law, for any one to hunt for pleasure, or for profit, but otherwise, where it is for the good of the commonwealth. It is observed by Bracton, that a man out-lawed *caput lupinum gerit*, all to pursue him, and he may be hunted through the country, 8. E. 4. fol. 18. a. Justification to dig the ground, and to fasten stakes by fishers to dry their nets, and this is a good justification, because the same was for the good of the commonwealth, to use fishing. As to this case here in question, one may well pursue such a beast or vermin, when once he is up, and that into another's man ground, but a man cannot justify his entering into another man's ground, to find, and so to hunt such a vermin, without his consent first had for the same, but he will be a trespasser for so doing, 38 E. 3. fol. 10. b. a man may follow his hawk or his hound, in pursuit of the game, into another man's land, being found in his own, and by 12 H. 8. fol. 10. if a man flies his falcon in his own land at a pheasant, and he kills the pheasant in another's ground, he may follow his hawk and take the pheasant, and is not to be punished but only for his entry into the other's ground: the digging here in this, or the like case may be lawful, if it be in pursuit of such a vermin, lawfully begun, and so doth earth him in another man's ground, as here it was, in the plaintiff's ground, he may well justify the digging of him out, (if by no other means he could come to take him) and this ought to have been shewed in pleading, and especially to have alledged that he

A. D. 1614.

Bracton, 8 E. 4. fol. 18.

38 E. 3. fol. 10.

12 H. 8. fol. 10.

A. D. 1614. could not, by any other way or means, come by him, and get him out (but by digging for him); but this he hath not so set forth, to make good his justification, for he might have got him out either by smoking him out, or by using of tarriers to get him out, and so as the case 13 H. 8. fol. 16. here is, the justification is not good: and so is 13 H. 8. fol. 16. expressly in point, that if a man cuts down his oak, which falls in another's ground, if he justifies in trespass he ought to alledge especially that he could no otherwise do; and agreeing with this is the book of 6 E. 4. fol. 8. 6 E. 4. fol. 8. and so the defendant ought to have done here in this principal case, to have made his justification good, which he hath not so done, and so for this cause the plea and justification is not good, and judgment ought to be given for the plaintiff.—*Croke*, Justice agreed the difference before the taken by Dodderidge and demanded, whether it was lawful for any one, to come into another's orchard, for to kill a bullfinch there being a hurtful bird, for picking the blossoms off from the trees; and this may be alledged to be for the public good, but yet this is not lawful for one so to do; the court in this case did agree, that upon a pursuit, he might well follow and kill, but not otherwise, without the assent of the owner of the ground, and that the case 12 H. 8. fol. 10. of 12 H. 8. f. 10. ought to be intended to be in the case of a pursuit.—*Dodderidge*, Justice. As this case here is he needs not to aver, that he had land of 40*s*. per annum Statute of R. 2. cap. 12. *le purview* of the statute of 13 R. 2. cap. 12. aiming at hunting only for pleasure. And so the court all agreed the former difference, where a man enters first into another's ground, to find such beasts and vermin, and where such entry is by way of pursuit; in the first, the assent of the owner of the land is first requisite to be had, or else he will be a trespasser; in the second no so, but well justifiable: and so all the judges agreed clearly in this case, that the plea and justification of the

defendant was not good, but that judgment ought to be given for the plaintiff, and so by the rule of the court, judgment was entered for the plaintiff. A. D. 1614. Judgment given for the plaintiff.

Geush v. Mynns.—Cro. Jac. p. 321.

Trespass *quare vi et armis clausum fregit, &c.* The defendant justifies upon a report, that a vermin called a badger was found there *ad damnum inhabitantium ;* by reason whereof he uncoupled his hounds in the place where, and hunted there, and found the badger, and chased him until he earthed him in the place where, and thereupon digged the ground and took the badger and killed him ; that afterwards he stopped up the earth again, *quæ est eadem transgressio, &c. ;* and demands judgment.—Whereupon the plaintiff demurred. A sportsman may justify hunting a badger, fox, or other beast of prey, over the ground of another ; but he cannot dig him out when earthed. See last case, S. C.

The Court held, that the action well lay : for although the common law warrants the hunting of such ravenous beasts of prey in another man's land, because the destroying of such creatures is profitable for the public, yet the law requires that such things should be done in an ordinary and usual manner : and this is confirmed and explained by the statute of 8 Eliz. c. 15. ; for although the statute gives reward for the killing of vermin, yet it saith it must be with consent, and with reasonable engines and devices ; therefore there being an ordinary course, viz. hunting to kill the badger, the digging for him was unlawful. Nichol's case (*a*) in 36 & 37 Eliz. for a fox is expressly to that purpose. 1 Brownl. & Gould. 224. 2 Bulst. 60. S. C. Godb. 122. Salk. 556. 11. Mod. 75.3. Bl.Com. 213. Dougl. 747. 1 Term Rep. 334.

The King v. Briggs.—Bulstr. Rep. p. 295. 12 Jac. 1. A. D. 1615.

If a *quo warranto*, for him to shew by what warrant he claims to have a forest. He puts in his plea, and claimed to have a forest and a court of swannymotes, and this he claimed by a charter granted in the time of King H. 2. (but shews it not). *Yelverton*, the king's solicitor, moved the court, that he might have sight of A quo warranto for claiming a forest. Charter of King H. 2. 1. Rol. Rep. 112. & 194. S. C. 2 Co. Rep. 46. 189. Poph. 150. S. C.

(*a*) 2. Roll. Ab. 558.

A. D. 1615 Palmer, 60, 87. S. C.

the charters, by which he claimed the same.—*Coke* Chief Justice. No subject can have a forest.—*Dodde ridge*, Justice, agreed with him herein, and the reaso of this is because that a justice seat is incident to a fo rest, and none can make a justice in eyre but the king —*Coke*. It is a chase, and not a forest, being in th hands of a subject, a swannymote court a subject ma have, but no subject can have a forest, because none ca make a justice in eyre but the king.—*Dodderidge*. Princ Henry, who is dead, had a forest granted unto him with a power also to make a justice in eyre, and licenc to keep courts; and the Duke of Lancaster also ha such a grant, with special commission, to make a jus tice in eyre, for keeping of courts.—*Coke*. To make justice in eyre, and such like, these are jura regalia.— *Briggs* here pleads a patent, of King H. 2. and entitle the Earl of Shrewsbury; and shews the charter (*pro lat. hic in curia.*)—*Velverton* moved the court for th king that he might have sight of the charter, which th court granted to him, because the defendant claims h interest by it; the charter being viewed, was to have forest within twenty manors; and he farther shewed th confession of Sir Francis Bacon, then attorney-genera of the same. The court upon this answereth, that not withstanding this confession of the attorney-general, w will not yet give any judgment in this case against th king; for no such judgment in any case is to be given as in this, the same being to be perpetual.—*Coke*. Her is a *salvo*, for the king, *salvo jure;* the whole cour said, we will not here give way to such a confession but this matter shall be tried.—*Coke*. If he have n allowance for justices in eyre, this charter is of no force —*Bridgeman*. Here was no usage, at any time, of any forest, nor of any liberties of a forest.—*Coke*. Briggs I think, will relinquish this, and so this case was ad journed for farther argument herein.—Afterwards, s

A. D. 1615. Term Hil. 12 Jac. B.R. this matter moved again.

Termin. Hillar. 12 Jac. B. R. this matter was moved again; and it was urged, that he claimed a forest by the charter of King H. 2. the which he had shewed to the king's attorney-general, and that he had satisfied him therein.—*Hutton*, Serjeant, moved the court to have judgment for Briggs, upon the confession of the king's attorney-general.—*Yelverton*, the king's solicitor, informed the court, that this charter of King Henry 2. being time out of mind, and no usage at all laid, to be in all this time, therefore judgment is not to be given upon this confession.—*Coke*. I have observed, that I was attorney-general longer than any one hath been these hundred years, (unless it was Gerrard,) and for a note worthy of observation, I never yet heard of an attorney-general of the king, to die in the time of his atneyship. As to the confession here of the king's attorney, this will much satisfy us, for matters in fact, (if the same doth not concern the commonwealth,) as if one be presented, for keeping of an alehouse without licence, and the attorney-general doth confess that it is an inn, yet we will have this tried: and for other common matters in fact we will give credit to his confession. But as to matter in law, his confession shall not bind us; and this difference I have here often learned.—*Dodderidge*. These five hundred years, this charter hath had no allowance, nor any manner of usage of this forest ever had as yet, by force of this charter, and since the time of King H. 2. many a cold wind hath blown, and many forests have been since disforested, and if he cannot shew some manner of usage of this, he cannot have it. —*Coke*. A common person may have a chase, but not a forest, for he cannot make a justice in eyre, and therefore no common person can have a forest; but he may have a nominative forest, and swannymotes.—*Dodderidge*. Pickering, Duke of Lancaster, had a forest in his hands, but was not able to make justices in eyre,

A. D. 1615 (unless by special commission:) and so had the la
Prince Henry.—*Coke* agreed with him herein.—*Crol*
Justice. By the statute of *charta de foresta*, *omnes j*
restæ videantur, and many of them were disforested.
Coke and *Dodderidge*. A swanmymore court, doth n
make a forest; but a justice-seat only makes it.—*Col*
That which cannot have commencement, but by cha
ter; this ought to have allowance within time of mem
ry, by matter of record; but if by prescription, he m
stand upon it, and this is clear; and so this was a
journed till a further time, to have a record in court, a
Term Hil. 12. Jac. B.R. this matter moved again. to be argued.—Afterwards, *s.* Termin. Pasch. 13 Ja
B. R. this matter was moved again, and it was shew
for Briggs, that King H. 2. was seised of Cleeve, whi
extended itself into 21 towns; and by his letters pat
30 H. 2. did grant this forest unto Richard Cliffor
afterwards the same came to the Earl of Shrewsbu
and so by mean conveyances, the same came to Oliv
Briggs, who died seised, and from him the same did
scend, and came unto Humphrey Briggs, the now
fendant, in the *quo warranto*, who pleads all this m
ter, the which plea, the king's attorney-general h
confessed to be true.—*Bridgeman*, notwithstanding
this, prayed judgment for the king: upon the insuffi
11 H. 4. ency of his plea, by 11 H. 4. the court *ex officio* ou
to give judgment for the king, in a *quare impe*
where a title appears for him, though shewed b
stranger; *a fortiori* here in this case, where it is by
shewing of the party himself. It was urged, that
plea of the defendant was insufficient, and that for t
causes: 1. The grant is void, and not to be plead
being out of time of memory, in the time of King H.
which cannot be tried; also a grant of H. 2. not ple
able, if he shew not an allowance of the same in ey
Coke 9 pars. fol. 27. b. 28. a. b. the Abbot de Strata Marcella's case. this appears, *Coke* 9. pars. fol. 27. b. 28. a. b. in
case of the Abbot de Strata Marcella, but admitting

grant good, if the king grants a forest, nothing doth pass by this, but the soil, no liberty, they are *magnalia corona*, and not to be transferred, in such a manner to a subject. The Earl of Lancaster hath a forest, but no book of it: the Duke of Lancaster and Durham have *jura regalia*, and in this regard have a forest, but not any other subject; and therefore his title here is insufficient, he claims here a special kind of forest afterwards, the defendant disclaimed in all the courts, but in the swannymote, and attachments, but as to this, the same is repugnant, because he doth first claim here a forest, and then all these, *ex consequente*, and so here appears no title for the defendant, and therefore judgment ought to be given against him for holding of these liberties so long, without any warrant, or power so to do.—*Coke*. If you have a charter, before time of memory, you cannot plead this, without shewing some allowance of it in eyre, if the same be of things granted, in point of charter; but of things in point of prescription, there you need not to shew a charter, but in such a case, usage time out of mind is sufficient; as for leets, waifes, and strayes, prescription for them is sufficient; but yet, if neither he, nor any of his ancestors ever had them, but he claims them by a charter granted in the time of King H. 2. and shews forth this charter, this is not good, because this charter cannot be pleaded; if the king hath a forest, and grants this unto a subject, this grant is not merely void, but he by this grant shall have a chase, but no swannymotes. 26 Liber. Assisarum, fol. 131. placito 60. the case of the Honour De Pickering, to which a forest was appendant, the king grants the bailiwick, to one in fee, rendering rent, and after grants the honor, with the appurtenances, to Edmond Countee De Lancaster, &c. If the king grants a forest to one, and also unto him, that he shall make a justice-seat; here he shall have a forest, by such a special grant,

A. D. 1615.

26 Liber. Assisar. fol. 131

A. D. 1615. with this expression in his charter, but not otherwise, a man may have a chase by prescription; but if it be by charter not good.—*Dodderidge*, Justice, demanded whether he pleads this charter, *pro lat. hic in curia*, and sealed, it was answered, that he did so.—*Dodderidge* The Earl of Oxford had such a charter, of the grant to him, to be chamberlain of England, in the time of King Henry 2. and this only under seal, and no other that ever I have seen.—*Croke*. Officers of the forest verderours, regardours, &c. and divers other things are incident to a forest; the liberty of a chase, come of a free warren, the Statute of *Charta de Foresta* reaches unto forests made by H. 2. he may here plead the charter of William the Conqueror, or of William the Confessor, as well as this of King H. 2.—*Dodderidge*. This is a very strange case, that a confession should be here by the king' attorney-general, he having no other conveyance to shew for this his claim, but on this charter of H. 2. a forest here this cannot be, for he hath waived all the principal courts of a forest, as view of regardors, before a justice-seat; the swannymote and attachments do not make a forest; the last Prince Henry had two or three forests.—*Coke*. The attachment and swannymote courts are only to present agisters regardours; the justice in eyre is to do nothing himself, but upon their presentments, by special words the king may pass a forest to a subject; but no man himself, can make a chief justice, without a justice seat, the court of swannymote, and attachments but of small, and to little purpose; and I do very much marvel at this confession, the like to which I did never hear, he claims here a forest, and a chase within it, and a chase he cannot have, clearly without a prescription, and so a day was given unto him, to shew his charter to the court.—At another day Sir *Francis Bacon*, the king's attorney-general, did recite the case

The Stat. of Charta de Foresta.

and said unto the court, that between these, *s. ubisunque fuerimus in Anglia, & attornatus generalis*, there is some affinity. In the time of King H. 2. the first charter was granted of this forest, and there have been divers charters of confirmation since; and Briggs here conveys title to himself under the title of the Earl of Shrewsbury, two acts of parliament have been made, the one in King E. Fourth's time, and the other in King H. 8. that a subject may have a forest, but not a justice-seat, for this is regal, but it is a forest, and hath swanny-motes. I have been very ill used in this case, to have this put on in this manner; after that I have made a confession of the claim, and no king's attorney hath been used so for these five hundred years; and I will hereafter take a course, that I will not be so used again. I have two powers in me, the one of prosecution, the second of non-prosecution, and of these two I do not know which is the greater the second is daily by the king's special directions to me, whether in such cases I shall proceed for him, or not, here in this case I have entered for the king a *non pros.* and confessed the plea, will you now have a judgment for the king, when as he himself will relinquish it.—*Coke.* A *non pros.* this is to be entered, but we will be advised of the judgment. It is a plain case, that judgment ought to be given for the king, if one claims a thing time out of mind, and doth not shew any usage of it, judgment ought here to be given for the king; and it doth not appear here unto us, any confirmation to be made; the plea here is *hic in curia prolat.* the charter in the time of H. 2. I never did see but one of them in my time, if the king had granted, *totam illam forrestam nostram*, shall the patentee have this, unless he have a warrant to make a justice-seat, he shall not have it, but only a chase, and so it hath been twice adjudged, that he shall not without special words: A swannymote, without a justice-seat, A. D. 1615.

A. D. 1615. is nothing, of no force at all.—*Dodderidge.* Yo cannot, nor ought you to confess, but only matters *fait*, and this may be good, but your confession is no force, for matters in law.—*Coke.* You confess, th is ministerial, but we are to give judgment, and this judicial.—*Curia.* The *non pros.* shall be entered, an we will be advised of the judgment.—*Coke.* The st tutes for *nisi prius* shall not bind the king, unless th the king, or his attorney, will give way unto it, as ap pears in Fitz. Nat. Bre. fol. 241. letter A. and so it w when I was attorney, and this is very clear, and so b the rule of the court, this matter was further adjourn till the next term, to have the charter brought in cour in the mean time the same rested upon a *Curia advisa vult.*—Afterwards, *s.* Termin. Hillar. 17 Jac. B. R this case was moved again, and then long argued touc ing the validity of the charter pleaded by Mr. Jenki for Briggs.—*Dodderidge.* Without all question, subject may have a forest, but the same then ought be by other words than are in this charter; but wh you disclaim in a justice-seat, farewell then to your f rest.—*Montague*, Chief Justice. A forest hath suc immunities which are prerogatives royal; and this the reason why a subject cannot have a forest, but chase; the statutes which make mention of forests, th are but nominal, not real.—*Dodderidge.* A justic seat, the chief subject of a forest; the Court all cle of opinion, that one cannot have a forest without justice-seat, for that this is the chief thing that makes forest.—*Dodderidge.* By apt words a subject m have a forest, as to have a justice-seat.—*Montague.* H cannot have a real forest, but only nominal, for the berty of wild beasts; the Abbot of Whitby, in a *q warranto* brought against him, did claim to have a f rest; search into all the precedents of *quo warranto* whether any one did ever justify, by way of plea,

Fitz. Nat. Br. fol. 241. A.

Term Hil. 17 Jac. B. R. this case moved again and argued.

have a forest, you shall find none; ancient charters are to be taken according to ancient usage; the whole court clear of opinion, that upon his disclaimer here in a justice-seat, judgment must needs be given against him, for the forest. For that he cannot have a forest without a justice-seat; and so the same was by the court adjourned to another time, for further argument herein, and the same not moved again. Perceiving how the opinion of the court was against Briggs, upon his claim, and disclaimer. A. D. 1615

Adjourned, but no judgment given. Yet the opinion of the court against Briggs.

Fowler v. Seagrave. 2 *Bulst. Rep. p.* 254. 12 *Jac.* 1. A. D. 1615.

In an action of trespass, nota, per *Coke*, Chief Justice. When a man claims a warren, *infra omnes terras dominicales*, he cannot extend this into the land of freeholders; for when any one claims a warren by charter, he cannot clearly inlarge this beyond the charter, but he ought to take the same, as it is expressed in the charter, and not otherwise; otherwise it is, where he claims the warren by preseription, and this is the difference, the court agreed with him herein.

An action of trespass, &c.

Cowper v. Andrews. M. 12 *Ja. A. D.* 1615. *B. R. Gwillim's Rep. p.* 275. A. D. 1615.

Godb. 237. Moore. 683. S. C.

Okendon Cowper brings a prohibition against Roger Andrews, vicar of Cowfield, that whereas Thomas Lord De la Ware was heretofore seised in fee of an hundred and forty acres of land in Cowfield, late parcel of an ancient park called Ewhurst park, lately impaled and replenished with deer, and being so seised he and all those whose estate he had in the same hundred and forty acres, and all the farmers and occupiers thereof have used time out of mind to pay the vicar of Cowfield for the time being two shillings a year, and one shoulder of every third deer that within the same park should be killed, in full satisfaction of all tithes renewing upon the

Qu. Whether a *modus decimandi* for a park, viz. 2*s.* a year, and a shoulder of every third deer killed in it, be determined by disparking.—The pleadings in this case may be found at length in Winch's Entries, 6: 8; but

A. D. 1615. this statement of them is taken from Hobart, 39. prefixed to his report of his own elaborate argument. There is a loose and mutilated account of his lordship's argument, and that of Mr. J. Warburton, in 1 Ro. Rep. 120. and the arguments of the counsel may be found in Godb. 237.

same hundred and forty acres, which the vicars hav always accepted in discharge of all tithes; and the deduceth down the hundred and forty acres to himself and then shews, that though he tendered the two shillings by the year in such years, and though in the sam there were no deer killed, yet the defendant refused t receive the same two shillings before-mentioned to b tendered, and sues him for tithes in kind for thos years.

The defendant by protestation denying the prescription, for plea saith, that the park, long before the tim of the subtraction of the tithes aforesaid, was dispark ed, and the deer in the same were utterly destroyed an killed by the occupiers and possessors of the said park and all the lands lying within the said park were con verted into arable land and pasture, and so remain and because the plaintiff, after disparking of the par would not pay tithes for the cattle and corn, &c. there fore he sued him. Whereupon the plaintiff demurre in law.

And whether a consultation should be granted, th Court were divided in opinion; *Nichols* and *Hoba* being against a consultation: *Winch* and *Warburto* for one.—*Hobart*, Chief Justice, said, that the tw shillings is clearly a *modus decimandi* which is certai and annual, and the disparking does not prevent th payment of it: and the shoulders are casual, for if th owner does not kill a deer, or but two in a year, th vicar will not have a shoulder.—And *Nichols* said, tha where the owner converts tillage into pasture, the parso will lose his tithes of corn; and where the owner di parks his park, the parson will lose the shoulders; bu he will have the two shillings, and he shall recover i the spiritual court a recompence in money for the shou ders; but the whole park is bound by the *modus dec mandi*, and the vicar shall not have his tithes in kind.—

It seemed to *Winch* and *Warburton*, that by the disparking the prescription as to the shoulders was determined, and consequently, the whole *modus decimandi*, and then the vicar shall have tithes in kind; and if the park be revived, the prescription and *modus decimandi* will be also revived, as tenure by castle ward, &c. A. D. 1615.

The King v. Davies.—1 *Rol. Rep.* 11. 12 *Jac.* 1. A. D. 1615.

Indictment for ingrossing.

Davies was indicted and convicted by the name of Davies, fishmonger, for ingrossing, and buying divers salmon, which he kept and sold. And being removed by *habeas corpus*, *Whitlock* takes an exception to the indictment, because it appears thereby, that he is a fishmonger, and, by the statute, any fishmonger may buy and ingross fish at his pleasure.—*Coventr.* on the other side. The statute has excepted, that a fishmonger should not buy by forestalment, nor by retail, but at reasonable prices, and therefore, being indicted for that, he ought to plead that he is not within the exceptions, so in this case this exception to the indictment is not good, until the judgment is reversed.—*Coke.* If any man buy malt and sell it again at unreasonable prices, still it is within the statute, and this has been ruled in the king's bench. The law is the same in the case of a fishmonger selling at unreasonable prices. So the indictment is for ingrossing fish, which a fishmonger may lawfully do; but here the judgment is good, until it be reversed, and therefore he must be remanded.—And it appears by the statute of 5 Edw. 6. c. 14, upon which this indictment seems to be founded, that *Coke* intended the forestalling of a fishmonger in markets; for it appears by the statute (as I understand it), that the forestalling of fish going to market is punishable.

A. D. 1615. *Pratt v. Sterne.* 1 *Rol. Rep.* 200.—12 *Jac.* 1.

Pratt brings replevin against Sterne, who justifies as bailiff of Lord North, lord of the manor, where, &c. and prescribes, that Lord North had had a leet from time immemorial, to be holden twice a year, at a certain time, and that it was presented at the leet, that the plaintiff had erected a dove-cote on his ground, where there was none before, and had stored it with pigeons, which flew about the country and devoured the grain to the great damage of the subjects of our lord the now king, there inhabiting.—*Bunge* took several exceptions to the pleading, some of which were against the record, and others appeared by the record, and therefore I will not speak of them. But the first exception, which had any colour in it, was, because he prescribes to hold a leet twice a year, between a certain time; and that this leet was holden in April, which is according to the prescription; but it appears that this prescription is not good, as being contrary to the statute of and in 8 H. 7. The reporter was of opinion that a leet is within the statute.—*Coke.* If that were the case, it would overturn all the leets in England, and the said statute is concerning towns; but a leet may be holden by prescription at any time of the year.—*Dod.* of the same opinion. The second exception was, that it is shewn, that upon a presentment, it was ordered at the leet, that the plaintiff should pull down the said dove-cote before a certain day, under a penalty; for which penalty, as this act was not done before the day appointed, the defendant distrained; and he had not shewn, that the plaintiff had any notice of this order of court, which he ought to have according to the 45 Edw. 3. 19.—*G. Croke* of the contrary opinion. The 45 Edw. 3. is, that notice should be given when it is intended to hold a leet; but no notice is necessary here, because the plaintiff was one of the tenants, and by

intendment was at court, and therefore ought to take notice of the acts of the court.—The third exception was, that the lord had distrained for this penalty and amercement, and had not alledged any prescription to do it, and that therefore the distress was illegal.—Br. Leet, 37. agrees with this.—*G. Crooke, contra.*—10 Hen. 7. 15. If a man prescribes to distrain for an amercement at the leet it is a double plea, 7 H. 6. 12.—10 H. 6. 7. Book of Entries, 506, 507. a man may distrain for an amercement in the leet, and Co. 8. Griesley it was resolved accordingly.—*Coke*, of opinion that the distress was unquestionably legal; as to the point of law, *Bing* thought that the erection of a dove-cote is not a common nuisance presentable in the leet. These birds are for the sustenance of man, and their dung manures the land better than any other. And the statutes of 18 Rich. and 4 Edw. 1. of Bragg. provide for the maintenance of such dove-cotes, that no one shall destroy the pigeons; therefore were they lawful, otherwise the statutes would not have made any provision for their preservation. *G. Croke, contra.* These statutes enact, that they shall not be destroyed with engines; but that is no reason that any one may erect a dove-cote; for there are statutes made against killing deer, and still no one can erect a park without the royal licence: so, in our case, no private individual can erect a dove-cote without licence. But the lord of a manor and the parson of the parish may.—*Dod.* asks him, who shall give the licence, and what reason there is in any distinction between the lord of the manor or the parson of the parish and a tenant of the manor; for there is no reason, because he is lord of the manor, that he may erect any thing, which may be destructive to his tenant's grain.—*G. Crooke* does not answer that, but says, that it is a common nuisance, because pigeons will fly, and devour corn, for more than 60 miles.—*Coke.* I have A. D. 1615.

A. D. 1615. known it proved in evidence, that they have strayed 60 miles; and this was known by certain marks on the pigeons.—*Haught.* thinks, that the pleading is bad; for it is stated, that he had erected a dove-cote to the common damage; but he ought to have shewn what the damage was, *viz.* that they flew about and devoured the corn (which was assented to by *Coke* and *Dod.*) because the damage is not apparent. But it is otherwise in stopping a way, or breaking down a bridge; there "to the common damage" is sufficient; for there the damage is apparent.—*Dod.* 19 Edw. 3. A plea that it was presented that he stuck stakes in the river Lee is not good without saying, that boats could not pass. And *Coke*, *Dod.* and *Haught.* said, that perhaps in the case the pigeons were kept in the house, and did not fly out, so that there was no damage.—*G. Crooke.* It is alledged that they flew out.—*Coke*, *Dod.* *Haught.* Still it is not sufficient; but it ought to have been alledged, that they devoured the corn.—*G. Crooke.* The record is so; then they said it was proper. *Haught.* Conies are no nuisance.—*Coke.* They are not used to stray more than a mile.—*G. Crooke.* In Cro. 5. Bowlston, there is a judgment cited; that it is a common nuisance presentable at a leet, that a tenant of the manor had erected a dove-cote.

Exception to the presentment.

It was adjourned to Mich. 13 James. The case was argued by *Dompart*, who said, that the presentment was only, that the plaintiff had illegally built a dove-cote and not that it was a common nuisance; but that was averred in the plea; yet he conceived, that the defendant could not aid the presentment by his plea, which was assented to by the court, and. for that omission, the court seemed to incline against the warrant. Adjourned.

A. D. 1616. *Godbolt*, 259. 13 *Jac.* *Pratt v. Lord North.*

A man was distreined by the bailiff of the Lord North

for 20*s.* imposed upon him in the court-leet for the erecting and storing of a dove-cote: and it was said, That it cannot properly be called a nuisance, but for the destroying of corn, which cannot be but at certain times of the year: and therefore it was conceived, that the party who was presented might traverse the nuisance to be with his pigeons; and it was said, that a man might keep pigeons within his new house all the year, or put them out at such a time as they could not destroy the corn: and *Cook*, Chief Justice, said, That there is not any reason that the lord should have a dove-cote more than the tenant; and he asked the question, whether the Statute of E. 2. saith, *Inquiratur de* dove-cotes erected without licence, who should give the licence? *Ad quod non fuit responsum.* In Mich. Term following the case was argued by Dampport, who said, that the erecting of a dove-cote by a freeholder was no nuisance: for a writ of right lieth of a dove-cote, and in the register it is preferred and named before land, garden, &c. But he said, that there was a fatal defect in the plea; which was, That the presentment at the leet was, that Prat had erected a dove-cote unlawfully, and did not say, *ad commune nocumentum*, as it ought to be, otherwise it is not presentable in the leet: and therefore although it was otherwise in the plea, That it was *ad commune nocumentum*, the same did not help the defective presentment. A. D. 1616.

Cro. Jac. p. 382. 11 *Jac.* 1. *Prat v. Stearn.*

Replevin. Upon demurrer the case was, that a freeholder erected a dove-cote upon his freehold, where there was not any before, and stored it with pigeons: this was presented at the leet, and a pain assessed to amove it by such a time; and for not amoving it he was amerced; and for the amercement a distress taken by

A nuisance is presentable at a court leet; but the presentment must conclude, "to the common nuisance of all

A. D. 1616. the lord of the leet. The question was, Whether th distress were well taken ?

the king's liege subjects," and if an amercement be affixed, the lord may distrain of common right. Se. qu. If a newdove-cote be a nuisance.

First, Whether the erecting of a dove-cote by freeholder, and storing it with doves, be a nuisance an offence against law ?

Secondly, Whether the lord may distrain witho special custom for a pain or amercement in a leet ?

Coke, Chief Justice, held, that it was a common nu sance, and enquirable in a leet ; but the other justic seemed to doubt thereof. But for the second poi they all resolved, that he might distrain, or have h action of debt for such a pain or amercement: but to the matter they would not speak, because the presen ment was not good ; for that it is presented, that I erected a dove-cote, and stored it with pigeons ; but I doth not say in the presentment that it was *ad nocume tum legiorum domini regis* ; which ought to be in ever presentment : and although the party hath here averre that it was *ad commune nocumentum*, yet that is n sufficient ; for it ought to be in the presentment, whic is the charge : and this fault was held incurable. Wher fore it was adjudged for the plaintiff.

1 Rol. Rep. 156. 200. S. C. 5 Co. 104. 8 Co. 41. Cro. Eliz. 148. 414. 4 Com. Dig. 166. 5 Mod. 130. Salk. 175. 502 Ld. Raym. 69. 2 Bac. Ab. 615. 3 Bac. Ab. 686. 1 Hawk. P. C. 361, 362. and the cases there cited.

See 1 Jac. c. 27. and 2. Geo. 2. c. 29.

A. D. 1617. *Webb's Case.* 1 *Rol. Rep.* 411. 14 *Jac.* I.

One Webb was fined by the lord admiral, being justice of the forest of ————, for committing a tre pass on the forest with certain sheep ; and, for refusir to pay the fine, he was imprisoned for the contempt, a which was returned on a *Habeas corpus.*—*Bridgma.* I conceive, that the return is bad, because it does n appear that the trespass was committed within the f rest ; nor is it shewn before whom the justice-seat w holden.—*Coke.* It is sufficiently good, before whoms ever it was holden ; and it is returned, that the tre

pass was committed within the doles* of the forest, and by doles are meant bounds, and it is therefore good; but we will consider, whether he might have been imprisoned for refusing to pay the fine.—*Dod.* I conceive that a person cannot have a common of pasture in a forest, unless it be by prescription; but he may by prescription. Which distinction was agreed to by *Coke*, who said, that the Statute of *Charta de Foresta* is only an affirmance of the common law, and therefore a man may prescribe against it, if, in this case, the imprisonment be legal, the prisoner is not bailable, having been committed by a justice of the forest; but otherwise, if it be illegal.

A. D. 1617.

* An old Saxon word, synonymous with pars or portis in Latin, antiently applied to a meadow divided into several shares, which was therefore called a dole-meadow. The narrow slips of pasture, often left between ploughed furrows, to which our antient law writers gave the name of dali prati, are still called doles in some parts of England.

The King v. Rivett. 3 Bulst. p. 178. 14 *Jac.* 1.

By indictment upon the Statute of 23 Eliz. cap. 10. for taking of partridges, exceptions taken to the indictment, the taking being therein laid to be cum retijs, &c. et alijs, whereas there is no such words, (as cum retijs) and so the indictment not good.

Indictment upon the Stat. of 23, Eliz. c. 10.

The whole court clear of opinion, That the indictment was bad for this cause.

Another matter was then moved upon this Statute, Whether such an indictment may be taken before the justices of peace, or not? The Statute being that justices of assize in their circuits, and justices of the peace in every shire, county, and town-corporate within this realm, in their sessions, shall and may, by virtue, &c. hear, inquire, and determine of all, &c. To this it was said, Shall be examined before two justices of the peace, this to be by examination of witnesses, but if the same be at the assizes, then the same to be according to the law by way of indictment.—*Dodderidge*, Justice. By this construction, both parts of the Statute

A. D. 1617. do well stand together, if at the sessions, then to pu sue the course of proceedings there by indictment, a so the law is to be taken. But if to be examined befc justices of the peace, this then to be taken by exan nation of witnesses. Here the indictment being cu retijs, the same is not good, and so by the rule of t court, for this exception the indictment was quashed.

Indictment quashed.

Bridgman, p. 23. Rex v. Byron. 14 Jac. 1.

In a Quo Warranto, for that the defendant for a yc past, hath used and yet doth use without any warra within the manor of Colwick, in the county of Nottin ham, within the bounds of the king's forest of She wood, and within the regards of the said forest, to ha a park within the said manor, with a pale, hedge, a ditch enclosed, being two hundred acres of pasture, a a hundred acres of wood within the said park, Et venandum, capiendum, occidendum et apportandum the said park, and two hundred acres of pasture, anc hundred acres of wood, omnes et omnimodas dam Domini Regis forrestæ suæ prædict, in pareum pr dict et prædict, 200 acr. pasturæ et 100. acr. Bos aliquo tempore venand, et occidend. Ita quod Forre tini Domini Regis forestæ prædict, nec aliquæ aliæ pe sonæ quæcunq: intromittantur ad venandum et fuga dum intra parcum prædictum et 200, acr. pasturæ 100, acr. Bosci sine licentia defendentis.

The defendant pleaded, that John Biron, knight, t defendant's grandfather was seised in fee of a messua of a hundred acres of land, two hundred acres of me dow, three hundred acres of pasture, and a hundr acres of wood in Colwick, in the county aforesaid, nc and time out of mind called the manor of Colwic within the meets and bounds of the forest aforesai And that the said John Byron the grandfather, and :

those whose estate the said John Byron hath in the afore- A. D. 1617.
said house, and a hundred acres of land, two hundred of meadow, and three hundred of pasture, and a hundred of wood in Colwick aforesaid, have had, held, and have accustomed to have in the aforesaid two hundred acres of pasture, and a hundred of wood, parcel of the aforesaid tenements called the manor of Colwick, belonging to the said manor of Colwick, enclosing, ditching, and hedging at their will and pleasure, with all liberties, privileges, and franchises to the said park belonging, and in the said park from the time aforesaid have used to have and to keep deer, and from time to time to constitute and appoint a keeper of the said deer in the said park, who from the aforesaid time have used to keep the same, ac ad venandum, fugandum, occidendum, capiendum et asportandum omnes et omnimodas damas in eodem parco de tempore in tempus existentes ita quod nullus forestarius Domini Regis, forrestæ prædictæ nec aliquæ aliæ personæ quæcunq; intromittantur ad venandum et fugandum in parco prædicto sine licentia prædicti Johannis avi. And set forth that the said John the grandfather died seised, whereby the said manor, &c. descended to Sir John Byron his son. And that Hilary, 3 Jacobi, a fine was levied between Sir Peter Leigh and other plaintiffs, and Sir John Byron the son, defendant of the said tenements, to the use of the said Sir John for life, the remainder to the defendant in tail.

And that the seventeenth of December, 10 Jac. did let the premisses to the defendant for eighty years, if the lessee should so long live, whereby the defendant, the 26 Mar. 11. Jac. was, and is thereof possessed and did aver that the manor of Colwick in the information, and the said messuage, a hundred acres of land, two hundred of meadow, three hundred of pasture, and a hun-

A. D. 1617. dred of wood to be the same, and did also aver the lit
f the lessor.

The attorney-general for the king did reply, th
before the information, *sc.* 9 October, 19 Jacobi, an
long before, and continuing after until the exhibiting
this information, the defendant, the park and tenemen
aforesaid, with ditches, hedges, and fences, had
sleightly enclosed, that the king's deer of the aforesai
forest for defect of sufficient enclosing of the park an
tenements aforesaid, through the default of the defe
dant, did enter, and the deer of the king into th
said park and tenements aforesaid, for the cause afor
said, entering, the defendant did very unjustly kill th
said deer in the said park and tenements aforesaid.

The defendant did maintain his bar, and traverse
without that, that the defendant, the park, and tenemen
aforesaid with such slight fences, hedges, and ditch
enclosed did keep the same, quod damæ Regis de fo
resta prædicta de tempore in tempus intra tempus pra
dictum in parcum et tenementa prædicta pro defec
sufficientis inclusuræ parci et tenementorum prædict
rum in defectu defen. intraverunt, absque hoc quod Defe
dens damas Regis de forresta prædicta in parco et ten
mentis prædictis pro defectu sufficientis inclusuræ parci
tenementorum prædictorum, in defectu defendentis minu
juste interfecit modo et forma, prout, &c. Whereup
the attorney demurred. And I conceive that judgme
ought to be given for the king. First, Because the pl
in bar and the rejoinder made by the defendant is alt
gether insufficient, for divers causes. Secondly, As
matter in law.

And as to the first, The Quo Warranto doth suppo
that the defendant did use the liberties there mention
within the manor of Colwick, being within the meets a
bounds of the forest of Sherwood, and within the r

guards of the said forest, and the defendant did know this to be within the meets and bounds of the said forest, but does not answer whether it be within the reguards or not, for it may be within the meets and bounds of the said forest, and yet not within the reguards: as if the manor were disforested by Carta Forestæ, because it was a subject's manor, and not the king's, yet it remains within the meets and bounds of the said forest, but not within the reguards, for now by the disforesting it is made purlieu, and not subject to the reguards and laws of the forest, as to the owner of the manor. Vide Carta Foresta, fol. 1. and yet notwithstanding this statute, if the king had granted this manor to be free of the reguards, or out of the reguards, yet is it still within the meets and bounds of the said forest. A. D. 1617.

Secondly, The defendant makes title to the liberties whereof Sir John Byron his grandfather was seised in fee, viz. of a messuage, a hundred acres of land, two hundred of meadow, three hundred of pasture, and a hundred of wood in Colwick, now and time out of mind, called the manor of Colwick. Quodque ille et omnes illi quorum statum idem Johannes habuit in tenementis prædictis, habuerunt, tenuerunt, et habere consueverunt in prædictis 200 acris pasturæ et 100 acris bosci parcellis prædictorum tenementorum, vocat. mannerium de Colwick, prædictum parcum, tenementa prædicta, vocat. mannerium de Colwick, spectant et pertinent, &c. So that the defendant doth not prescribe, but doth allege only that Sir John Byron, and those whose estate he hath, have used to have a park, the which is no title to the park, for that ought to be time out of mind.

Thirdly, The defendant doth claim to have a park of the aforesaid two hundred acres of pasture, and hundred acres of wood, whereas there is no speaking

A. D. 1617. of two hundred acres of pasture before, and therefo he ought to have said, in two hundred acres of pastu parcel of the said three hundred acres.

Fourthly, The defendant doth not answer to killing of the king's deer of the forest, but doth o justify the killing of all deer, time out of mind, be in the said park.

Fifthly, The rejoinder is a manifest departure from bar, for in the bar he claimeth to have a park ditcl and hedged, Per voluntatem eorum inclusum, so that this pretence he may keep the park with such hedges as he will, and yet in his rejoinder he d traverse, absque hoc, that he kept the park adeo pa sepibus et Fossatis, quod Damæ Regis de foresta p dicta in parcum prædictum pro defectu inclus intraverunt et absque hoc, &c. So that the defen by his rejoinder doth make an issue upon that wl he doth justify in his bar, and doth, upon the ma deny in his rejoinder the matter alledged by him his bar.

And, as to the matter in law, I conceive that the fendant cannot prescribe to have a park in such ma as he pretendeth, for that such prescription is q contrary to the nature of his royal franchise of forest, and is to the destruction of it, for a forest royal franchise, so that regularly none can have it the king, as it was adjudged in this court in a Warranto against Humfrey Bigges. And Manw fol. 1. A forest is a certain territory of ground vileged for wild beasts and fowles of the forest rest and abide in the safe protection of the king, fo princely delight and pleasure, and doth consist of things. 1. Vert. 2. Venison. 3. Particular laws privileges. 4. Certain officers.

But by this pretence of the defendant, the fore the king is privileged for wild beasts to rest in pr

tion of the king, but they are subject to being destroyed by the defendant; for by such pretence none can enter there but he or his keepers. And I conceive that no body can pretend to have any profit or pleasure in the forest, which tends to the destruction of the forest, and that is the reason that one cannot prescribe to have common in a forest, for sheep, geese, goats, or hogs, for to suffer them to common there, is Ad magnum nocumentum ferarum forestæ: and such a prescription the defendant maketh, which is not only Ad magnum nocumentum, but to the utter destruction of the forest. And if it be objected, that this park claimed by the defendant is but a little part of the forest, this is no answer: for as in the case of a common, no man may prescribe to have sheep, &c. in the forest, so cannot he in any part of the forest, and if the defendant may prescribe to have such an irregular park in part of the forest, so may others claim such like prescriptions in other parts of the forest, and so the king shall lose all the franchise of his forest, and the defendant may make his fence or ditch so low withoutside, and so high within that the king's deer cannot get out again when they are come in, and so this park shall be in the nature of a trap to catch the king's deer. A. D. 1617.

And further, he that will prescribe to have any common profit or pleasure in the freehold or inheritance of another, ought to make his prescription in such manner, so that he must leave the residue of the profits to the owner, and cannot utterly exclude the owner; and therefore if one doth prescribe to have all the herbage, pannage, and profits of the land of I. S. no man can conceive that this prescription is good. Neither can a commoner prescribe that the lord of the soil cannot put in any cattle into the land. But in our case the very franchise of the king's forest doth consist of vert, veni-

A. D. 1617. son, lands, and officers of the forest, for the king m have a forest, although he hath no land there.

And in the Commentaries, 332. If a manor with the forest of Waltham do escheat to the king, and king grants the manor to one in fee, yet shall not he ha the liberty of the forest. And the same law is where king grants all the land which he hath in the forest.

But notwithstanding I agree that one may have park within a forest by prescription or by grant, but th the same ought to be kept so enclosed, that the beasts the forest cannot enter into the park, which if not do it is a forfeiture of the liberty of the park, and so it if he have a salterie, or deer-leap, for the nature o park is to be enclosed; and in the 10 H. 7. 6. it is sa that a park consists of soil, enclosure, and game, and the 15 Ed. 3. Thomas Earl of Lancaster, lord o forest, did grant leave to one John Harrington to m a park within the said forest, and there it is adjudg that if the grantee does so slightly enclose the pa so that the forest-beasts may get in there, that it forfeiture, and the lord of the forest may enter take the deer.

But by the pretence of the defendant, the king s not have so much power in this land, being in the m of the forest, as he hath in the lands of any of his s jects, which do lie without the forest: for if for beasts stray or wander into the land of a subject, of the forest, the foresters may enter into this land, rechase them into the forest again.

Hobart, p. 119. *Wood v. Budden.* 14 *Jac.* 1.

Wood brought an action of trespass against Bud and declared in the new assignment in a close of ture in Tollard Royal; the defendant pleaded, William Earl of Salisbury was seised as in fee,

ight of an ancient chase, replenished with deer, called 'ranborn, and so prescribed in liberty of chase, and hat the same chase did extend itself as well in and hrough the said eight acres of pasture, as in and hrough the said town of Tollard Royal, and justifies he trespass for use of the chase. The plaintiff main- a'ns his declaration, and traverseth, that the chase loth not extend itself as well to the eight acres as to he whole town. And this issue was tried at the bar, and found for the plaintiff. And now it was said in rrest of judgment by *Finch*, sergeant, that this issue nd verdict were faulty, because if the chase did extend o the eight acres only, it was enough for the defendant, nd therefore the finding of the jury, that it did not xtend as well to the whole town as to the eight acres, lid not conclude against the defendant's right in the ight acres, which was only in question. But it was nswered by the court, that there was no fault in the ssue, much less in the verdict (which was according o the issue;) but the fault was in the defendant's plea, hat now takes the exception, for he puts in his plea nore than he needed, *scil.* the whole town, which being o his own disadvantage, and to the advantage of the laintiff, there was no reason for him to demur upon it, ut rather to admit it as he did, and so to put it in issue. nd so judgment was given for the plaintiff.

A. D. 1617.

2 Cro. 85. 103.

1 Cr. 7. Verdict upon issue larger than is needful. Dy. 365. b. 2 Cro. 184. 1 Cr. 6.

Cro. Jac. p. 463. *Athel v. Corbett.* 15 *Jac.* 1. A. D. 1615.

Trespass for the taking of a greyhound with a collar. The defendant saith, that the dog was coursing a hare in his land, and therefore he took and led him away; whereupon the plaintiff demurred.—And adjudged for the plaintiff, because the plea is frivolous, whereby it seems trespass lies. And in 12 Hen. 8. pl. and 2 Edw. . "Avowry," it was adjudged that replevin lies of a arret.

Trespass will lie for taking a greyhound coursing a hare on the defendant's land. Hob. 283. 3 Lev. 28. 1 Sid. 336. Lut. 1494. 1 Com. Dig.

97. 5 Com. Dig. 362. 1 Term. Rep. 334. 1 Saund. 84. F. N. B. 86. Cro. liz. 125.

A. D. 1618. *Jones v. Gastril.* 2 *Rol. Rep.* 2. 15 *Jac.* 1. *A. D.* 16

For tithe of pigeons no prohibition lies, and accor ingly it was resolved. For the court said, that ti ought to be paid of pigeons, and for rabbits too. *Dodridge*, Justice; to which the court assented.

Hilary Term. 15*th James, in the King's Ben*

Dewell v. Saunders. 2 *Rol. Rep.* 3, 4. 30.

Duell and Saunders' Case; which began in Trini 15th James. Ro'. 1118.

Duell brings an action of trespass for taking his catt the defendants justify and shew, that Henry, Earl Northumberland, was seised of the manor of Islewor Sion, in the county of Middlesex, and that he l a leet in his manor; and shew, that at a leet holden a certain time, the plaintiff was presented for havin pigeon-house, he being neither the lord nor the pars upon which he was commanded to shut it up, and t had notice; and that refusing to shut it up he fined by the steward in a certain sum, and because plaintiff refused to pay it, the defendants, as bailiffs to Earl of Northumberland, took the cattle and impoun them, until the plaintiff entered into a bond to the amerciament; and this erection of a pigeon-ho was pleaded to be to the damage of the king's subje to which the plaintiff demurred, and it was argued *Thomas Crewe* for the plaintiff, and *Noy* for the fendant.

The third and last exception was, because the stated it to be to the common damage of all the kin subjects, and did not shew any certain place.

To this it was answered, that, if any particular p had been mentioned and alledged, it would have b bad; for the nuisance ought not to be alledged to b any certain place.—*Montague*, Chief Justice, at close of their arguments this day, (for it was arg

another day,) passed over their exceptions, and argued A. D. 1618.
the matter in law, which was whether a person, being neither lord of the manor nor parson, could erect a pigeon-house? The counsel for the plaintiff said, that he could, because it was not a common nuisance. See 27 H. 8. 26. A particular person shall have an action for a particular tort, done by means of a common nuisance: as if a horse should founder by means of a gutter made in the highway. But by 33 H. 6. 26. no one shall have a particular action for a common nuisance, and, to prove that is not a common nuisance, by 37 H. 6. 4. the king cannot pardon a common nuisance, as the repairing of a public bridge; but the king may grant any one the privilege of erecting a pigeon-house; therefore it is not a common nuisance, see 27 E. 3. 6. and Britton, 31, where common nuisances are treated of, and nothing is said of this; a common nuisance ought also to be towards all the king's subjects; but the erection of a pigeon-house cannot be so. Likewise where the tenant may be punished for a nuisance, the lord may also be, if he offend; but here he cannot be punished for erecting a pigeon-house. A statute was lately made in Scotland, that no one, who had not land of 40*l.* a year, should erect a pigeon-house; and, if it be no common nuisance, then any one may erect a pigeon-house, and the law cannot be altered but by act of parliament, as 38 Edw. 1. 1. and 2 H. 4. 18. *nolumus mutare leges.* Also, pigeons are preserved by the common law, and by statute, and therefore by the common law there are several actions of trespass given, as in the Register, 1046, 104, or 404, 106, and 11), "wherefore he broke his pigeon-house and took out his pigeons." The statute, also of 24 H. 8. c. 10. has provided for the destruction of crows, but enacts nothing against pigeons; and the statute of 8 Eliz. c. 15. makes provision for them, that they shall

A. D. 1618. not be taken with engines. Neither can it resemble warren, and it is no nuisance to make a warren witho licence; which still no one can do without a royal l cence, as is decided in 11 Co. 86. So this depen on licence and pardon as before. See 16 E. 4. 7.

On the other side, it was argued by *Noy*, for th defendant, who agreed to the rule, that the king cann grant a licence to the injury of his subjects, accordin to 3 E. 3. tit. Ass. 448. for he cannot grant a licen for the erection of a dove-house. And he also agreed, th the lord of the manor shall be punished, if he offend a case where the tenant would be punished if he offended for it is holden, that the lord of the manor and th parson may erect a dove-house; but a dove-house b prescription is good. So if a person wishes to kee his pigeons in his house, and not to suffer them stray out: in that case he may have a dove-house for it is the nuisance, that prevents him from erecti one. And as for the law made in Scotland, it is nothin to us. In Denmark a man may erect a pigeon-hou in some parts of the country, and in others not; *vi.* he cannot in the corn country; but he may in th barren country, where there is no corn. See 5 Co. Bulstrode's Case, 104. b.

The case was argued by the judges after two argu ments delivered at the bar by *Crewe* and *G. Croo* for the plaintiff, and *Noy* and *Damport* for the defe dant.—*Haughton*, Justice. The question is, whethe the matter disclosed to the court, be a nuisance in law or not. For if it be not a nuisance in law, then th allegation of the defendant, that it is a common nuisanc to the whole country, is not material in many cases. man has a special property in cattle, as long as the remain on the spot, and where he has an interest, an so of fowls and fish, and, when they are removed fro thence, the property passes as that of the deer in m

park, 22 H. 6. 59. and of the rabbits in my warren, A. D. 1618.
22 H. 6. 59. and 43 Edw. 3. So, if an action of trespass be brought for taking a hawk, it does not lie, unless it be shewn that it is reclaimed, or in his possession; Spencer's case in Dyer. So of fish in my fishery, several or free; see 7 Co. the Case of Swans, and 17 Edw. 4. 7. And the king has no greater privilege than his subjects in such case; for, if his deer stray out of his forest or park, unless they be in purlieus or chases, the property ceases. In Fitzh. f. it is said, that a writ of trespass lies "wherefore he broke his pigeon-house," and so it is in the Register; but in the 16 E. 4. 17. it is holden, that trespass does not lie for taking pigeons, which are at large, but that an action on the case does, (but what warrant they had for such an opinion, I do not know,) and therefore, since the owner has no property in his pigeons, while they are out of his pigeon-house, it would be hard to punish him for them in the leet. It is said in 35 H. 8. Broo. Custom, 59. to be common custom throughout England the common law; and no precedent can be shewn, that a man for killing the pigeons of another, being in his land, not that he had brought an action against the owner for the damages which the pigeons had done him, but usage and custom have always treated them as *bona nullius*; and this is a great proof, that the owner shall not be charged here. Particular laws have also been enacted for the preservation of pigeons, and therefore the framers of the statute did not consider them as a common nuisance. As to Bonston's Case in 5 Co. 104. b. the reason of that case does not satisfy me, for two causes: In the first place it does not appear from what grounds the case or the opinion there given is drawn: the second exception there is contrary to the premises; for there the lord of the manor is excepted, and certainly, if it be a common nuisance, the law

A. D. 1613. exempts no one, so as to protect him in committing it
And as to the Roll of Ragman, I give but little regard t
that; for it is only an inquiry by the justices in eyre
who have made dove-houses without the king's licence
And if it was a nuisance, then the king could not licenc
any one to commit a nuisance.—*Dodridge*, Justice
The nuisances, which a leet has the power of redressing
ought to be immediate and public; but the erecting c
a pigeon-house is not a direct public nuisance; for th
nuisance done by pigeons, is immediate to him whos
corn they devour, and the public nuisance comes i
consequence; viz. that the price of corn is raised an
a scarcity occasioned thereby. Secondly, a person ma
have a dove-house by prescription, and no person ca
prescribe to commit a nuisance; for no one can prescrib
to do an annoyance and prejudice to an individua
much less to the public. Thirdly, any one, who ha
been prejudiced by a public nuisance, may justif
levelling and pulling it down for the purpose of re
moving it; but no one will say, that, if a man buil
a pigeon-house and stock it with pigeons, any one wh
has been damaged by the pigeons, may lawfully pull
down. Then, if a leet cannot inquire into the erectio
of a dove-house, nor punish the owner, as it may for
public nuisance, let us see what a leet may do to th
contrary by the Statute of 18 Edw. 2. A leet may in
quire of those, who kill pigeons with a felonious inten
and the Statute of Wales, made 12 Edw. 1. is to th
same effect. By the Statute of 18th Eliz. a reward
given to those who destroy crows and other ravenou
birds; but pigeons are excepted in the statute. Th
does the statute law favour pigeons. So the commo
law appoints a remedy for their preservation; for
the Register there is an action on the case given *quar
occidit volatum columbarium* generally, and it is no
said in *columbario*. As to Bowlston's case, 5 Co. 104, 1

I cannot imagine from what principle it is drawn: A. D. 1618.
I have heard, that the opinion was conceived on a view of the antient inquiry in eyre, *viz.* who has erected dove-houses; but I am not certain of this. As to the pleading it is clearly bad; for it is not shewn that the nuisance was committed within the jurisdiction of the leet; but it is shewn that the pigeon-house was erected at Helston, which was not the nuisance. Then it is moreover stated, that the pigeons "fly about the whole country doing damage," and nothing is shewn particular, that they damage the corn within the jurisdiction of the leet. Wherefore, said *Dodridge*, *J.* in his argument, if pigeons be on another person's land doing damage, he may justify the killing of them; but let him beware that he does not incur the penalty of the statute.—*Crooke*, Justice, supposing the law to be so, which is questionable, the reason being put by the exception of Dodridge to the justification, that pigeons in a pigeon-house belong to the owner; but, being out in the land of another person, they are accounted *nullius bona*, and the person on whose soil they are, may lawfully kill them by the common law, and the law is the same in the case of deer, rabbits, and other animals *feræ naturæ*, as well in the case of the king as of a subject; for when they stray out of their owner's land they are granted to the first occupier. But in the case of salmon and sturgeon, the property in them always remains in the king, whatsoever place they may stray to, for they are royal animals, as is declared in the statute concerning the king's prerogative. Then, if the owner has no property in them, he cannot be punished for them in the leet; for it will be in vain for the law to give a remedy by presentment or action to the party injured by them, and he may have a more speedy and less expensive remedy in destroying them. It has been agreed that a person may prescribe to have a pigeon-house; but there is no

A. D. 1613. prescription in a nuisance. For it was very lately determined in this court, that where a person prescribed to lay timber in the highway, before his house, the prescription was void and against law. But he may prescribe to lay them near the way, and no writ of *ad quod damnum* has ever been sent out, upon which the king has founded a grant or licence to erect a dove-cote. The reason of which is, I think, because in the judgment of the law it was legal for any one to erect a dove-cote on his own land without a licence.—*Montague*, Chief Justice, agrees with him. In the 21 E. 3. 4. it is holden, that a leet has only a concern with such matters as it antiently had; but it is certainly only of late, that a leet has punished the erection of pigeon-houses as a nuisance; for I never saw a precedent of it. And therefore I say in this case, (as Littleton himself said in a similar case, on the Statute of Merton,) that a presentment of this nature in a leet is not legal; for, if this may be by law, it will be implied that it may be put into practice at any time. If the law consider pigeons, or pigeon-houses, which are for their preservation, as a common nuisance, then no more actions for the recovery of them will be allowed by law. 17 E. 3. a præcipe does not lie for a pigeon-house, and the Register and Fitz. 2. put this in the order of demand next after a mill, and before land, *viz.* a messuage, mill, dove-house, &c. By 48 E. 3. partition shall be made of a dove-house; and by 45 E. 3. a wife shall be endowed of it; and by 16 Edw. 4. 7. and 8. an action of trespass lies for destroying them in a pigeon-house, and there is no doubt of this, if trespass lies for killing them when they are out, *viz.* out of the owner's land. And I hold that an action does lie for killing them out of the owner's soil; for I see a great difference between beasts or birds, in which a man has an absolute property, *viz.* as log as they remain in his

possession; for *proprietas duplex est jure proprietatis, et jure privilegii.* A man has an absolute property in pigeons; for in action for them he shall say, "*columbas suas*," as the form of the Register is. And *Bracton* says, "*columbæ nostræ sunt eousq; habent animum revertendi.*" But if a man bring trespass for taking his deer out of his park, or for killing his rabbits in his warren, he shall not say '*suas*,' but generally, "*quære damas*," &c. And this is my meaning of the difference, see 10 E. 4. 14. 12 H. 8. 4. In Scotland and Normandy there have been provisional laws made against the erection of dove-cotes, but no statute has been made in this realm against pigeons, but several have been made for their preservation, and therefore the reasons which have been deduced from such laws in Scotland and Normandy, fail here. For the Statute 2 H. 5. 4. Mar. Tho. 8 Eliz. and 10 James, were made for the preservation of pigeons. It has been said by others, that the king can licence a person to erect a dove-house; but the king cannot licence any one to erect a nuisance, 27 E. 3. 6. nor can he pardon a nuisance when committed, 22 H. 6. because *contra bonum publicum*, and accordingly he told the secondary to enter judgment for the plaintiff. A. D. 1618.

Roger Wormall, Rowland Tristram, and Thomas Banck's Case. 2 Rol. Rep. 120. 17 *Jac.* 1. *A. D.* 1620. A. D. 1620

They were indicted because they had conspired to enter into the park of the king, (*viz.* into Hyde Park) being fenced round and used for the preservation of the king's deer, and there they did hunt, kill, and carry away the king's deer, and they conspired that if any of the loyal subjects of the king impeded them in the fulfilment of their evil purpose, aforesaid, they would kill him too; and they on a certain day entered the said park, and made an assault with malice prepense upon

A. D. 1620. H. and B. the servants of the keeper of the park, and killed H.; and upon this indictment they were arraigned and convicted; and it was clearly resolved, that, although they bore no malice in fact, against H. who was killed, yet because they entered to do an illegal act, and upon this murder ensued, in this case the law implies the malice, and adjudges it to be murder; and therefore the indictment (which said, that they of their malice prepense conspired to kill any one who resisted or impeded them in killing the deer,) is warranted by the law. And the Lord Ch. J. said, that he had seen the indictment of the Lord Dacres, who was attainted in the time of Henry 8. for an offence of the same nature, and the indictment was in the same form; and he said, that before the Stat. of Charta de Foresta, cap. 10. it was felony to hunt the king's deer in any forest; but by the said Stat. it is provided *quod nullus omittat vitam aut membra provenatione*; but by Stat. 1 Hen. 7. c. 7. it is made felony for to hunt in any park with painted faces, in a disguised manner, or to hunt in the night, if they, being apprehended and examined, deny it. And *Coventry*, the king's solicitor, said, that Smart was convicted of felony upon this Stat. within a year and a half, and the prisoners at the bar, being convicted for their offence, had judgment of death, and could not have their clergy. And Note, it was proved that the servants of the keeper assaulted them first, and willed them to stand, and they fled, and one of the keeper's men discharged a piece at them, and yet they fled until one of the keeper's men did hurt one of the malefactors, and then they turned back and killed one of them, and yet this was murder, for they ought not to have fled, but yielded themselves to the keepers, when they were required by them so to do (nota hoc bene); and it was resolved that although but one of the malefactors gave the wound, and but one of them killed him, yet it was murder in

Rast. Felony, 7.

them all.—*Sir Henry Montague*, Chief Justice, said, that although the law so privilegeth park-keepers, that the keeper may justify the killing any one who comes to disturb the game, by hunting, killing, &c.; yet if from the private malice he bears to any one who comes into the park without any intention of hunting, he kills him, this is murder in the keeper. A. D. 1620.

Manklowe v. ——— 2 *Rol. Rep.* 153. 17 *Jac.* 1. A. D. 1621.

A. D. 1621.

Manklowe was indicted upon the Statute of 3 H. 7. c. 2. see Rastall, Felony 7, for hunting in Horne Park, which was one of the king's parks, and the indictment consisted of two parts. 1. That he hunted and killed a deer at eleven o'clock at night. 2. That, being examined before the justice of the peace, he denied having done it feloniusly, so that the felony consisted principally in the denial; and *Montague*, Chief Justice, said that there were four things necessary under this Statute to make it a felony. 1. Information given to the justice of the peace of the offence. 2. His warrant made thereon. 3. His examination of the offence. 4. The denial of the offender. Manklove was convicted of the offence, and accordingly had his clergy.

Grisel v. Leigh, Sir W. Jones, 12. 18 *Jac.* 1. A. D. 1622.

A. D. 1622.

In trespass between Grisell and Sir Thomas Leigh, it was resolved and adjudged by the court, that if a man be seised of a warren, and the tenants have common in the waste of the manor, and the king grants warren to the lord in such a division of the manor, the lord cannot use his warren and turn rabbits into the waste in prejudice of the common.

Grice v. Lee. Winch, p. 16. 18 *Jac.* 1. *A. D.* 1622.

Grice against Lee, in an action upon the case, and the

A. D. 1692. plaintiff declared that he being long time before, and still is seised in fee of certain messuages, and lands in Layton Bazzard in the county of Bedford, and that to these messuages he had a common appendant time beyond memory, &c. in 600 acres of waste called Layton Heath, and had common in 600 acres of wood in Layton aforesaid, and that the defendant had made certain coney-burrows, and which the aforesaid conies (where he had not made any mention of any conies before) eat up the grass, (and that the defendant had enclosed the said wood, by which the plaintiff had lost the profits, and the defendant as to the digging of the heath for conies, said, that E. 3. granted to the dean and canons of Windsor, that they and their successors haberent in omnibus terris dominicalibus liberam warrennam sibi tunc et successor et in posterum conferendam. And that the 20 E. 4. the Duke of Suffolk and his wife granted to them the said manor of Layton; whereof the said heath is parcel, and said that 22 E. 4. it was enacted by parliament, that all charters made by King E. 3. to the dean and canons of Windsor shall be good, and that the said dean and canons of Windsor being so seised of the manor of Layton, and of the Heath in the 3 H. 7. erected a free warren, and that by mean conveyance the said D. and C. conveyed that to the defendant, and so justified the making of the said coney-burrows, by virtue of the charter of E. 3. and as to the 600 acres of wood he justified by the licence of the father of the plaintiff, who then was seised of the common, and upon these pleas in bar the plaintiff demurred; and Sergeant Richardson took exception; because that it is not expressly alledged that he was seised of the house and land, to which the common is appendant, at the time of the making of the coney-burrows, for he only said that a long time before the erection of the coney-burrows, and yet he is seised, which implies

that he was seised, before and after, but not at the time of the warren made, and for this he cited the Book of Entries where waste was brought, and he counted of a lease for life to the defendant and a grant of the reversion, and an attornment of the tenant, and that the defendant had made waste, and ruled to be evil, because he had not alledged that this was after the attornment, and so in Stradlings and Morgan's Case; and he cited a judgment in 5 Jac. in C. B. Adkinson brought an action of trespass against I. S. and declared quod per multos annos jam preteritos he had exercised merchandise, and that the defendant such a day said of him that he was a bankrupt; and it was adjudged that the declaration was evil, because he had not alledged that he exercised merchandise at the time of the speaking of the words, and he said that the cause of the judgment was entered upon the roll, and the same case he could shew to the Court: and *Hobert* desired to see that, for he doubted much of the law of the same case, to which *Winch* and *Hutton* agreed; and *Richardson* said, that as to that which may be said, that a fee simple shall always be supposed to have continuance if the contrary is not shewed; to that he answered that is not so, for the book of the 7 H. 7. 8. if in bar of assise, the tenant said that I. S. was seised and gave, this is not good, because he had not shewed quod sit seisitus existens dedit, &c. which being in a plea in bar, is more strong then in a declaration, to prove that a fee shall not be intended to have continuance without an express allegation: and so he concluded that the declaration is naught: but by *Hobart*, *Winch*, and *Hutton*, it is very good notwithstanding this objection, and *Winch* cited the 13 Eliz. in Ejectione firme, where the life of the person was not clearly alledged, but the declaration only was that the lessor was, and yet is seised, which was A. D. 1622.

A. D. 1622. a sufficient averment of the life of the person, and so the declaration is good, and another exception wa taken to the declaration by *Hitcham*, Sergeant, be cause that the plaintiff had declared that the defen dant had made coney-burrows, and with the afore said conies had eat up the grass, where he had n alledged any storing of the coney-burrows befor with conies, and then it was impossible they should e up the grass to the prejudice of the plaintiff; but t this it was answered by Sergeant *Attoe*, that thoug the declaration as to that is naught, yet the digging the coney-burrows is to his prejudice, and sufficie to maintain the action, which the Court granted; an as to the matter in law, *Attoe* argued for the plaintif and recited the case to be that E. 3. granted to th dean and chapter of Windsor, that they shall have fr warren in the lands which yet they had not purchase and of which they were not seised at the time, wh ther this is a good grant, and shall extend to tak effect after the purchase; see Buckley's Case: and h argued that it is not a good grant, and he put a diff rence between a warren, and other privileges which a flowers of the crown, which may be granted in future but a warren never was a flower of the crown, and f that reason a grant de bonis et catallis fellon, et fugi vorum may be granted, and yet not be in esse at t time of the grant, for it is a flower of the crown, a it is said 44 E. 3. 12. that the king may not grant warren in other men's lands, but only in the land the grantee, and upon this he concluded that this gra shall not extend to land after purchased, and the rath because it is in the nature of a licence which shall taken strictly, see 21 H. 7. 1. 6.—And *Hobart*, Ch Justice, said, that this word demesnes is derived of French words en son manies, and though the lord of manor had the waste in his hands; yet he had not

common; and as to the confirmation by Ed. 4. they all agreed that this will confirm nothing to him but what was granted by E. 3. himself; and then as to the licence pleaded that is of no effect, for first the licence is pleaded to be made to one Sir Cha. Haydon, and the defendant did claim under him, and this licence was made by the father, which will not bind the son who had the land, to which the common is appendant, after the death of his father, for a common may not be extinguished without deed; and Hobert and all the Court agreed, that the licence of the father will not bind the son; and by the court if nothing is shewed to the contrary within a week, judgment shall be given for the plaintiff. A. D. 1622.

Samborne v. Harilo. Bridg. Rep. 9. *Trin.* 19 *Jac.*

In an action of trespass, for that the defendant, 10 Oct. 44 Eliz. the plaintiff's free warren at Mouldford, in certain places there called Harecombe, Harecombe Coppice, and the Down, did break and enter, and did therein hunt without the licence of the plaintiff, and three hares and three hundred conies did take and carry away.—*Continuando*, as to the said hunting and taking, and carrying away the said hares and conies, from the said tenth day of October, to the first of November.

And further declared, That the tenth of April, 1 Jac. the defendant the said warren in the said places did break and enter, and therein, (without the licence of the plaintiff) did hunt, and twenty hares did take and carry away, continuing the said hunting until the first of March next after, &c.

And further declared, That the tenth of April, 2 Jac. the said defendant the said warren in the said places did break and enter, and therein without the licence of the plaintiff did hunt, and 40 hares and 400 conies did take and carry

A. D. 1622. away, continuing the said hunting until the first of Marc following, *contra pacem*, &c. and *ad dammum*, &c.

The defendant as to the *vi et armis*, and to the fir trespass, (except the entering and hunting in the sa place called the Down, and the taking and carryir away the three hundred conies) pleaded not guilt And as to the entry, hunting and carrying away t said conies, he saith, that the said place called t Down, is and hath been out of mind *communis fu dus*, contain, by estimation, 200 acres of land and pa ture, and that before the said tenth day of Septembe and before the said trespass, and at the said time t defendant was seised of a messuage and six yard lan containing a hundred and sixty acres, called the Man of Southbery, in Moulford aforesaid, and that the d fendant, and all those whose estate he hath in the p mises, time out of mind have had common of pasture the said Down for 240 sheep, levant and couchant up the said messuage and six yard land, and that the d fendant and all those whose estate, &c. have used for p servation of the said common, as often as the said co mon hath been oppressed and troubled with coni have used of custom to have liberty to hunt and to t the conies: wherefore the defendant, the aforesaid ti of the aforesaid first trespass, and for preservation of said common from such oppression and diminution afo said, into the said Down did enter, and there hunted, a the said conies did take and carry away, according the said custom, and continuing the said hunting all said time.

And as to the second trespass, besides the en and hunting in the said places called Harecombe, a Harecombe Coppice, and the Down, and the taking a carrying away 200 conies, he pleaded not guilty. A as to the entry and hunting in the said places, &c. saith, that the said places called Harecombe, and H

combe Coppice, are woodland, containing, by estimation ten acres, and that he was seised in fee of the said messuage and six yard land, and made the same prescription as aforesaid, for all his horses, cows, heifers, bullocks, and 240 sheep, levant and couchant upon the said tenements, *viz.* for the horses, cows, &c. at the Feast of St. George, and from that time, until the corn growing in the fields of Moulford were carried away, and after the corn carried away for the sheep, until the fourth of March next after, and made the former prescription for the sheep in the Down; and the same prescription also for hunting and taking away the conies as abovesaid, and so did justify the taking of the said 200 conies. A. D. 1622.

And as to the third trespass (besides the entry and hunting in the said places, and the taking and carrying away of the said 400 conies) he pleaded not guilty, and as to this plea he made the same prescription as before, upon which plea the plaintiff demurred in law.

And if this matter pleaded in bar was sufficient to bar the plaintiff of his action, was the question. And it seemeth to me that there is nothing in the defendant's plea to hinder the plaintiff from having judgment. And the better to argue upon this matter, I will first endeavour to shew what interest a commoner hath in the soil, and what things he may do upon the soil, for preservation of the said common.

2. Whether this be a good usage and custome to enable the defendant to hunt and kill conies in the plaintiff's free warren?

And as to the first, I conceive that he that hath common in another's land, hath nothing at all to do with the land any more than a meer stranger, but only to put therein his cattle, and to let them feed there with their mouths, and it is not his own common until his cattle have fed there,

A. D. 1622. 14 H. 8. 10. The owner of a common cannot grant th common to another's use. Et 27 H. 8. 12. a præcip does not lie of a common, for it is not my common unti my cattle have eaten of it, and therefore that whic another hath is not mine, therefore I cannot have a præ cipe against him who hath not that which I demand and in the 22 Assize 48. and 12 H. 8. 2. if a man hat common in another man's soil, and a stranger puts in hi cattle, there the commoner shall not have an action c trespass, for although he hath common, yet the herbag doth not belong to him, neither can a commoner do an thing upon the soil which tends to the melioration o improving of the common, as to cut bushes, ferne, o such things which do much impaire the common, neithe can he make a fence or ditch to let out the water whic spoils the common; but if he be utterly disturbed of h common, he may have an assize, or a *quod permitta* and if any damage or annoyance be made upon th land, whereby he loseth his common, he may have a assize.

And as the commoner may not meddle with the soi so cannot he meddle with any thing arising out of th land, or that doth grow, or is nourished by the same otherwise than to have his cattle to feed there, and there fore it is adjudged, Mich. 5. Jac. that a commoner can not kill conies there, but may bring his action on th case.

But I agree that a commoner may distrain cattle da mage feasant, because their being there is a damage no only to the owner, but also to the commoner, and a com moner may abate a hedge or a gate that hinders hi from coming to his common: wherefore I conclude th first matter, that the plea, as to that, is utterly insufficien by the law, if there were not a special custom alledged b the defendant. And therefore it is to be considered

whether this prescription alledged by the defendant to hunt and kill conies there, for preservation of his common, be good or no. A. D. 1622.

And I conceive it is unreasonable, and not good, because it is to the prejudice of the owner of the soil, without any consideration.

And it is unreasonable for two causes, first, because it is too general, for the defendant may hunt and kill as many conies as he will, for he doth not claim to kill a certain number that do surcharge the common, but generally (the conies there). Secondly as this plea is, the defendant makes himself his own judge to kill the conies as often and when he pleases.

Also it is against law, for it is to the destruction of the inheritance of another, which no person can justify by custom or prescription, unless for the benefit of the commonweal. 13 H. 8. 16. It is law to pull down a house if the next house to it be on fire, and so the suburbs of a town may be pulled down in time of war, and if enemies be on the coast, it is good law to come upon another man's land, and make bulwarks there; for the public good is preferred before any man's private benefit.

But when it is only for the private benefit of a man it is otherwise, 43 Ed. 3. a. The abbot said that he was lord of the town of A. and did prescribe that when the tenant ceased for two years, that he might enter until he be satisfied his arrears. And it was held by the Court to be an ill custom to put a man out of his inheritance, yet is that more reasonable than this case, for the time when the lord shall enter is certain, and the time that he shall hold the land is also certain: and 19 Eliz. Dyer, 357. a custom that all tythes let or granted for more than six years, of land in such a town, was held void by the Court, because it is contrary to reason, and to the liberty of the estate of him that hath a fee. And 9 H. 6.

A. D. 1622. 44 B. custom in a leet, that if the petit jury do make a false presentment, and this found by the grand inquest, they shall be amended: and it was held by the Court to be no good custom, and against common right, but if the custom were, that if the petit jury concealed any thing, they ought to present them to be amerced, this may be a custom.

And to prove that conies are part of the inheritance, see Coke Rep 7. in the Case of Swans. But it may be objected that this usage may have a legal beginning, viz. That it was so agreed at the time of the grant, or creation of the common.

I answer, That then it ought to have been specially pleaded, for else it shall not be so intended, as it is proved in the 35 H. 6. 28. Simon Eyre's Case, where a custom was pleaded in London, that if the goods of any man be pawned to a citizen for a debt due to him, that he may detain them until he be paid his debt; and it was urged because that it may be good to bind the debtor, because it may be intended it began by his own grant, but it was ruled that it shall not be so intended, unless it be specially alledged.

And that a man shall not be judge in his own case, is proved by 22 Edw. 5. 13 B. The defendant pleaded that at another time he accounted to the plaintiff, in the presence of A. B. and was found in arrear, wherefore he was committed to prison, and there it was adjudged that the party himself could not commit him to prison, and that an action of false imprisonment did lie against the plaintiff. And Cook, R. 8. Dr. Bonham's Case, and in the 5 H. 7. 9 B. if one prescribes, that if any cattle be taken upon his land damage feasant, that he may distrain them, and put them into the pound, until amends be made according to his own will: this was held not good, because then he should be his own judge which is against reason. And in the 19 Edw. 2. gard.

127. a custom was alledged in Ipswich, that when an infant could count and measure, that he should be out of ward, and holden to be void. 13 Edw. 3. where a custom was alledged, that when one could count 12d. and measure a yard of cloth, he may alien his land: and did aver, that the demandant was of such age; but because he did not alledge the age in certain, it was adjudged against the demandant. And Dyer, 91. a. One grants to another all his trees which may be reasonably spared, agreed that this was a void grant for the uncertainty. And in the 20 H. 7, 8. B. If *cestui que use* of a manor does bargain and sell 10*l.* land, parcel of the manor, no use is changed, for the uncertainty. A. D. 1622.

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2 Roll. Rep. 276.—20 *Jac.* I. *A. D.* 1624. A. D 1624.

Lord Zouch v. Sir Thomas Moore.

It has been objected that the park is parcel of the manor; but I answer, there is a special reason in this case why it should not pass with the soil, as I have said. But it has been objected, that the exception of the deer is vain, if the park does not pass. I answer that the exception does not intend of the deer in this park, but in the other parks of the manor. And I say, that if a man grant a park, excepting the deer, as appears in 10. H. 7. where it is said that three things are necessary to constitute a park, soil, enclosure, and game, the exception is not good, which destroys the thing granted.

2 Roll. Rep. 278.—It was said that a park might be granted by prescription, and it is convenient for a common person as well as for the king, and certainly had it been a warren you would not have taken it away, and there is no difference as to this matter between a park and a warren, 26 Ass. 60. The king had a warren to which a forest was appendant, and he granted the *honor cum pertinentiis*, the forest passes; but I say that it is not with a chase as it is with a forest.

A. D. 1624.

Mich. 22 Jac.—In the Star Chamber.

Fines in the Star Chamber for killing the king's deer.

Two men came *ore tenus* into the Star Chamber, fo stealing of the king's deer, and were fined 100*l.* piece, and three years imprisonment, unless it woul please the king to release them sooner, and before the should be released of their imprisonment to be bound their good behaviour: and it was observed by the Atto ney-general, that the offence was the greater, in rega that the king had but one darling pleasure, and yet th would offend him in that: and it was said by some the Court, that it was a great folly and madness in t defendants to hazard themselves in such a manner for thing of so small value as a deer was. The Lord Pre dent said, that Mr. Attorney was the best keeper t king had of his parks, in regard he brings the offend into this Court to be punished.—The Lord Keeper sai That the defendants in such a case being brought *ore t nus*, are not allowed to speak by their counsel, and y these men have had their counsel, but it was Pete counsellor's, meaning their sorrow and contrition at t bar, which much moved him, so that if his vote mig prevail, he would set but 20*l.* fine upon them.

Sir Francis Vincent v. Lesney.—Cro. Car. p. 18.

Trespass will lie for killing a hawk, without specifying the species, or shewing that it was reclaimed; but in trover this must be shewn. Post. 89. 544. F. N. B. 86. Dyer, 306. 5 Co. 35. Lut. 1359. 1374.

Trespass: For that the defendant *accipitrem ipsi* Francisci *percussit* with his staff, upon which stroke t hawk died. The defendant pleaded not guilty; and was found for the plaintiff, and damages assessed to s pounds. It was now moved in arrest of judgment, th the declaration was not good. Because he doth n shew what kind of hawk she was, as goshawk, lawn &c.; for *accipiter* is the genus, and in the declarati he ought to shew the species thereof: and it is here t uncertain; and compared it to Plater's Case *, where trespass *quare clausum fregit, et pisces cepit, &c.* t

* 5 Co. 34.

declaration was ill, because he shewed not their number and kind, as carps, tenches, &c.—*Sed non allocatur*, for here declaring *quòd accipitrem ipsius* Francisci, &c. being but one, is sufficient, and not like to Plater's Case, which was altogether uncertain: and this case is the stronger because it is after verdict, which hath found him guilty of killing of the plaintiff's hawk. A. D. 1624. 2 Lev. 201. 3 Lev. 536. Raym. 16. Salk. 666. Hob. 283. Cro. Eliz. 126. 288. 545. Cro. Jac. 262. 463. Carth. 396.

Secondly, It was alledged that the declaration was not good, because it is said *accipitrem ipsius* Francisci, and he doth not shew that she was reclaimed; for a hawk is *feræ naturæ*, and, if not reclaimed, the plaintiff cannot have any property in her, nor can she be said to be *ipsius* Francisci: and to confirm this Spencer's Case was cited *.—But the Court held the delaration to be good enough, being in an action of trespass for striking and killing, &c. which he only may have who hath the possession. And it differs from Spencer's Case; for there it was an action of trover and conversion, which lies not but of an hawk reclaimed, and which may be known by her vervels, bells, or by some other mark whereby notice can be taken of her owner. Whereupon it was adjudged for the plaintiff. * Dyer, 306.

Sir Charles Howard's Case. Cro. Car. p. 59.

Upon a conference of all the Justices and Barons, in the presence of Sir James Ley and the Earl of Marlborough, Lord Treasurer, who commanded them to be assembled, on a case out of the Exchequer, upon an information by English bill against Sir Charles Howard.

A park of which the king is seised in fee may be disparked, and all the deer therein granted over, by letters patent under the great seal: and by such a grant the office of keeper is virtually dissolved. S. C. Hut. 86. Jones, 151.

The King was seised in fee of a park, called Putney-Moore-Clap, and King James, by his letters patents under the great seal, granted *officium custodis* of the said park to Sir Charles Howard, *habendum* to him the said office, "*cum omnibus vadiis feodis* wind-fall trees, profits, and commodities thereto belonging, *in tam amplis modo et formâ prout aliquis alius officiarius illud*

A. D. 1624. *exercens habuit, tenuit, et occupavit, seu gavisus fuit et etiam pro consideratione predictâ* granted unto him an annual fee of thirty pounds *per annum* issuing out of all his majesty's manors in that county, *habendum* to him for life."

Afterwards the king which now is, by his letters patents under the great seal, published his pleasure for disparking the said park, and grants all the deer therein to Sir Richard Weston, chancellor of the exchequer, with liberty to take and carry them away, &c.—The Attorney-general argued this case for the King; and Mr *Andrews*, reader of Lincoln's-inn, for Sir Charles Howard. The Justices and Barons afterwards gave their opinions.

The first question was, Whether by these letters patents the king may dissolve the park? and, if those letters-patents be a dissolving of the park?—They all agreed, that the park is well dissolved, and shall no more be accounted a park, all the deer being destroyed; for a park consisteth of vert, and venison, and enclosure; and if it be determined in any of them, it is a total disparking; and notwithstanding the grant of the office the owner may well dispark it, according to the opinion of Wyther's Case, 6 Edw. 6. Dyer, 71.

If the king grant the office of parker, and afterward destroy the park, the office is virtually extinguished, and all the casual fees thereto annexed, irrecoverably lost.

Co. Lit. 233. 2 Inst. 199. Hob. 41, 43. Cro. Jac. 18,

The second question was, Admitting the park be dissolved, whether the office of the keeper be determined; and, if determined, whether Sir Charles Howard may have any remedy for the casual fees and profits?—They all held, That the park being dissolved, the office dependent thereunto is determined, and the grantee of the custody thereof hath not any remedy; for it being the will of the owner of the park to dispark it, and to destroy the deer, the custody is then determined, for he cannot be keeper where there is neither deer nor wood, but all destroyed. And although it be true, that an officer who hath the grant of an office for life or years, and is t

A. D. 1624.

have the profit of casual fees, as steward, bailiff, or parkership, (as it is in 31 Hen. 8. "grants" Broke, 134. and 34 Hen. 8. "Grants," 93.) cannot be discharged of the office, for then he should not have his casual fees, that is to be understood, that the grantor cannot appoint another where the park or manor always continues, as 18 Ed. 4. fol. 9. resolves; but when the park itself is determined and disparked, the office which is appendant thereunto shall be also determined; but so long as the park continues a park, he may not discharge him of the office, and make another officer, because he hath that office for his life, and the profits thereof consist in casualties: but the office of a keeper is in respect of the keeping of the park, and his casual profits are in respect of his pains and attendance upon the game, the keeping thereof; and it is to be intended, that at the beginning of that office they were only granted in respect thereof, and in continuance of time they are become appendant to the office, and when the park is destroyed, so as there need not such attendance, then *cessante causâ cessat effectus*: as if one grant the office of steward with all profits of courts, if the manor be destroyed, the office, and with it the casual profits, are determined also; so here the park and the liberty of the park being determined, the office is determined in itself.

9 Co. 50. Hutton, 86. 4 Com. Dig. 301. 2 Bl. Com. 38. 416.

The third question, (admitting the office to be determined,) Whether the annual fee of forty pounds being granted in consideration thereof, issuing out of the king's manors in the county of Surrey, be also determined?—And Sir *John Walter*, Chief Baron, held clearly it was; but all the other justices and barons dissented from him in this point only, because it is granted by a distinct clause, and not out of the park: and although the office be determined, yet because it is not by the act or default of the grantee himself, but by the act of the grantor only, they conceived the grantee

The grant of a collateral fee, as of forty pounds a-year to a parker for life, for the exercise of his office, is not determined, though the park be discharged, and the office thereby dissolved.

A. D. 1624. should enjoy that annuity. *Vide* 5 Edw. 4. 8. 7 Ed. 4
Hutton, 86. 22. Plow. 457. Sir Thomas Wroth's Case, and 381
Co. Lit. 233. b. Ante, 49. Post. 280. Cro. Jac. 18. Sir Henry Nevill's Case.

In Millen v. Fawdrey, Doderidge, J. 2 Car. 1. Latch. 120.

Crew, Chief Justice, said, that if deer come into m land out of the forest, and I with my dogs chase their it is a sufficient excuse for me to wind my horn to rec the dogs, because by this the keeper of the forest h notice that a deer is in chase. And in this Court, in th time of Popham, one justified the pursuit of a fox i another's land which he had started in his own, becaus it is a noisome beast. So it is of a wolf; and *Bract* says, that as an outlaw—*Caput lupinum gerit*, that i every one may pursue him.

Comin's Case. Hetley's Rep. p. 60. *A. D.*

In one Comin's Case, it was agreed by the Cour That a subject may have a forest, but cannot have a ju tice seat. But he may have a swanmark court, and t other courts, and a commission to execute them. Th a forest in the hands of a subject shall pay tythes; an it was agreed that in the hands of the king it is priv leged. And by Henden, Davenport, and Atthowe, se geants, it is only his personal privilege which extends the lessee of the king, but not to the feoffee. And it w agreed, that where the right of tythes come in questi between a parson and the vicar, who are both eccl siastical persons, it shall be tried by the Ecclesiastic Court. But *Richardson* said, the books make a dou where it is between the servant of the vicar and the pa son, but it seemed to him to be all one.

Reynell v. Champernoon. Cro. Car. p. 228.

The owner of a several fishery may detain nets or

Trespass, for taking and cutting of his nets and oar The defendant justifies, For that he was seised in fee of several piscary, and that the plaintiff, with dive

others, endeavoured with their oars to row upon his water, and with the nets to catch his fish; and for the safeguard of his fishing he took and cut the nets and oars, &c. Whereupon the plaintiff demurs. A. D. 1624.

It was moved by *Bulstrode Whitlock*, that this plea is not good, for he cannot by such colour cut the nets and oars.

All the Court was of this opinion, for the reason *supra;* but he might have taken the nets and oars, and detained them as *damage fesant*, to stop their further fishing. Whereupon it was adjudged for the plaintiff.

other engines *damage fesant*; but if he cut or destroy them, trespass will lie. 3 Burr. 1170. 2 Wils. 313. 5 Com. Dig. 360. 2 Espin. Dig. 106. Dougl. 56.

Anonymous. Cro. Car. p. 264.

A prohibition was prayed by *Calthrop* to stay a suit upon an appeal here to the delegates from a sentence in Ireland (*a*) for tithes of fish taken in the sea, because fish in the sea or great rivers are *feræ naturæ*, and not tithable.

Secondly, Because the sea is not within any parish; so as no spiritual person can say it is within his parish where the fish is taken.

But the prohibition was denied; for tithes of fishes are usually paid in Ireland, as *Jones*, Justice, affirmed. And it was said in Cornwall, they pay tithes for fishing in the sea to the parson of the parish where they are landed; and it is a custom in Yarmouth, that tithes shall be paid for herrings.

By custom, fish taken in the sea is tithable where they are landed. Post. 339. 1 Roll. Ab. 636. 656. Noy, 108. Hetl. 15. Palm. 527. Bunb. 43. 256. 3 Com. Dig. 101. 3 Term Rep. 385.

(*a*) See the statutes 22 Geo. 3. c. 53. and 23 Geo. 3. c. 28. by which this appeal is now abolished. Post. 512.

The King v. Sherington Talbot. Cro. Car. p. 311.

Quo Warranto, by which he claims liberty of free warren in Ridge and two other towns in the forest of S. The defendant disclaims to have such liberties in the said two vills and in the forest. But as to his claim of warren in Ridge, he pleads, that he is seised in fee of the manor of Ridge, whereof the said vill of Ridge is

A prescription to have a free warren in a manor and in the demesnes thereof is good.

A. D. 1624. parcel; and that he and all his ancestors, and all whos
2. Roll. Abr. 619. estate he hath in the said manor, have had, time where
Sir W. Jones, 320. S. C. Cro. Jac. 156. 327. 6 Co. 14. 1 Peere Wms. 221. of, &c. liberty of free warren in all the said manor, an within the demesnes thereof, *ita quòd nullus fugab* any game of warren within the said manor and de mesnes thereof *sine licentiâ* of the said Sheringto Talbot.

Issue was taken, that he and all those whose estat &c. had not free warren within the said manor and de mesnes thereof; and found for the defendant.

Noy, Attorney-general, now moved in arrest judgment, First, That the plea is not good to prescri to have warren in the said manor and demesnes of th manor; for although he may prescribe to have it in h own demesnes, yet he cannot prescribe to have it in th lands of others his freeholders, nor ought he to prescri to have it pertaining to his manor: and for that purpo he cited the Book of Assises (*a*), that one ought n prescribe to have turbary in another's soil as appertai ing to his manor. Secondly, Because it is by prescri tion, *ita quòd nullus sine licentiâ* Sherington Talbo which is impossible to be, for the time whereof, &c.- *Rolle* answered to these objections, First, That a pr scription to have free warren in his manor is good well in the lands of the freeholders as in the demesnes for being by prescription, it is intended, that this liber was before the creation of the freeholders, whose esta was extracted out of the demesnes of the manor after th beginning of this prescription.—Secondly, That th allegation thereof is not of necessity, and doth not v tiate the prescription.—*Grimston* also moved in arre of judgment, Thirdly, That the trial was by *veni facias* awarded from Ridge, where it ought to have be of the manor, for Ridge is alledged to be but parcel the manor. And all the Court, for this cause, held to be a mis-trial, and not aided by any of the statutes

(*a*) 5 Assise, pl.

On issue on a plea of prescription to have free warren in the manor of A. if the venue be from A. instead of the

and that it ought to be of the manor, which is the greater and more notorious: wherefore a *venire facias de novo* was awarded.

A. D. 1634. manor of A. it will be a mis-trial.—But see the 24 Geo. 2. chap. 18. s. 3.

And it was moved, Whether that were within the statutes of *Jeofails*, because it concerns the king, and the statutes have an express proviso, that they shall not extend to appeals or indictments or informations upon penal laws, and cited some of them, but not any *quo warranto*?—*Richardson*, Chief Justice, *Jones*, and *Berkley*, held, that the statutes did not extend to this case, nor to informations of intrusion, for the king is not bound unless he is named.—But *Noy*, Attorney-general, said, peradventure it should be otherwise in case of a *quare impedit*, where the suit is betwixt the party and the king.

The statutes of Jeofail do not extend to informations *quo warranto*, or to proceedings on penal statutes. 2 Lev. 189. 3 Lev. 375. 1 Salk. 325. 1. Com. Dig. 343. 4 Burr. 2527. Cowp. 392.

But see now the 9 Ann. c. 20. as to informations in *quo warranto*, and the case of Atcheson v. Everet, Cowp. 392. that the statutes of Jeofail extend to penal actions, though not to criminal prosecutions.

Dawes v. Huddleston. (a) Cro. Car. p. 339.

A. D. 1634.

Culthrop prayed a prohibition against the parson of W. in the county of Westmorland, for suing for tithe of trouts taken in a river, because they be *feræ naturæ;* and shewed a precedent in Easter Term, 5 Car. 1. where a prohibition was granted against the same parson for suing for tithes of eels taken in the river, because they are *feræ naturæ;* and day was given to shew cause why it should not be granted.—And *Richardson*, Chief Justice, said, that he knew where one suing for conies taken in Methold-warren, a prohibition was granted upon debate; and that in Yarmouth was a suit for tithes of herrings taken in the sea, but they could not prevail. —*Jones* said, that in his country of Wales they used to pay tithes for herrings; and in Ireland it is a com-

Tithes are not payable for fish taken in rivers, except by custom. 1 Roll Ab. 635. 636. 1 Sid. 278. 1 Lev. 179. Noy, 108. 1 Vent. 5. Palm. 527. Hetl. 13. Bunb. 43. 356. 3 Com. Dig. 101, 102. and see the Case of Rex v. Carlyon, 3 Term Rep. 385.

(a) See 1 Roll. Ab. 635. b.

A. D. 1634. mon course to pay tithe of salmons taken in rivers.—*Richardson* said, that, peradventure, may be by custom; otherwise tithes are not payable for fish taken in rivers.

A. D. 1638. *Hinsley v. Wilkinson.* 8 *Car.* I. *Roll.* 302. *Cro. Car.* *p.* 387.

A commoner cannot maintain an action for damage done by the rabbits of another upon the common; for they are then *feræ naturæ*, and he may kill them.
Sir W. Jones, 356. S. C.
1 Roll. Ab. 90. 405.
2 Bulst. 116.
7 Co. 17.
Moor, 421.
Co. Lit. 56.
Cro. Jac. 195. 492.
2 Leon, 201.
Bridg. 10
1 Burrow, 259, 263.
2 Wils. 51.
2 Com. Dig. 433.
Powel on Devises, 35.

Error of a judgment in the Common Pleas in an actio upon the case. Whereas the plaintiff had declared that he was a copyholder of the manor of Lull, whereo a great waste, called Lull Waste, was parcel, and the co pyholders of the manor having common there, that the de fendant being seised of parcel of a wood called Lull Wood adjoining to the said common, maintained conies in the sai wood, which run out thereof into the common and eat u the common; whereupon the action was brought. Th defendant traverseth the prescription to the common and it was found against him, and judgment given.—*Germyn*, for the plaintiff in the writ of error, moved that this declaration was not maintainable, becaus none can say, when conies are upon the common, whos conies they are: and they cannot be said to be the de fendant's conies more than any others, for being out his soil he hath no interest in them more than any othe they being *feræ naturæ*, so as he hath not any propert in them until he takes them; and therefore Fitzh. Na Brev. 87. & 89. saith, they shall not be said *cuniculi suos*, nor *pisces suas* in common rivers; and althoug the commoner hath loss, yet it is without injury by th defendant.—*Grimston*, likewise for the plaintiff, urge further, that if this action should be maintainable the would be a multiplicity of suits, for every common would have an action; which ought not to be suffered and here is no more cause of action than when o suffers his doves to fly into the corn adjoining, f which clearly no action lies; for it cannot be know

whose doves they are, and the commoner is not at any mischief, for he may kill them if he can; and for that point cited 5 Co. 104. b. Boraston's Case.—And so held all the justices here, except *Berkley*, who doubted thereof: wherefore rule was given, that the said judgment should be reversed, if upon such a day, the next Term, other cause was not shewn, &c.; which was done to the intent there might be conference with the justices of the Common Pleas, to know if it had been moved in the Common Pleas, or if it had passed *sub silentio*, being after verdict. And the same day I conferred with *Hutton*, *Vernon*, and *Crawley*, Judges of the Common Pleas, if they knew any such case had been moved in their court; and they all said, they did not remember any such to be there moved, but that it passed *sub silentio*. And they all held, that an action upon the case lies not for a commoner; but he may kill them, for none hath any property in them. Wherefore the judgment was afterwards reversed. A. D. 1633.

The King v. Mynn. Cro. Car. p. 410. A. D. 1636.

Scire facias, where such judgment was given against him, he being found a trespasser, for cutting trees within the forest without licence; and the proceeding against him being removed by *certiorari* out of the chancery, and by *mittimus* sent into the King's Bench, he pleading such plea, and demurrer thereupon—it was adjudged for the king.

Proceedings in the forest courts may be removed into the King's Bench.

Sir Martin Lyster v. Home. Cro. Car. p. 544. A. D. 1640

Trover and conversion of an hawk, called a ramish falcon, supposing that he was possessed of that hawk, *ut de bonis propriis, et casualiter amisit*, and that she came to the defendant's hand; and he knowing her to be the plaintiff's hawk, yet being required had not delivered her, but converted her to his own use. Upon

Trover for a hawk *ut de bonis propriis* is good after verdict, for it shall be intended to have been reclaimed.

A. D. 1640. March, 12. S. C. 1 Roll. Ab. 5. Cro. Jac. 46. 262. Moor. 691. 3 Lev. 336. Cro. Eliz. 125. Owen, 95. Lut. 1350. 1 Com. Dig. 240. 5 Bac. Ab. 263.

not guilty pleaded, a verdict was found for the plaintiff —*Whitlock* moved in arrest of judgment, that the declaration was not good to maintain this action, because he doth not shew that she was a reclaimed hawk, and made tame, nor that she had bells or varvels to shew who was her owner: and a ramish hawk is properly such an one as liveth *inter ramos*, and from thence hath its name; and therefore relied upon the book 14 Eliz. Dyer, 306. Sir Richard Fines' Case.—*Jones* and *Berkley* inclined to this opinion.—But I conceived the declaration to be good enough, because it is aided by the allegation, that he was possessed of the said hawk *ut de bonis propriis*; and that the defendant, knowing her to be his hawk, converted her, &c. And it differs from the case of Sir Richard Fines; for there, although the said exception was taken to the count, yet it doth not appear but that the count was there held to be good enough.—But because the defendant's plea was held good, it was adjudged against the plaintiff, not for the insufficiency of the count, but upon demurrer upon the plea in bar, which was held sufficient. Vide 1 Co. 1. The Case of Swans, of what beasts and birds a man may have property.—This case was afterwards moved again in Hilary Term, 15 Car. I. and then, because upon divers former motions the court was always divided in opinion, the plaintiff, for his greater expedition, consented that judgment should be entered against him:- so the judgment was entered, *quòd nihil capiat per billam*.—The plaintiff brought a new action in the Common Pleas, and amended the fault in his declaration and had judgment by confession of the action, and on three pounds damages given by a *London* jury; and thereupon *Honden* moved in this court to have costs his former action.—But because the verdict was found for the plaintiff, and upon exception to the declaration judgment was given against him, the Court held, that no costs should be given.

If judgment be arrested, the plaintiff in a new action shall not recover the costs of the first. Ante, 175. Cro. Jac. 159. 1 Hetley, 50. 2 Com. Dig. 549. 1 Bac. Ab. 511.

Child v. Greenhill. 14 *Car.* 1. *Roll.* 664. *Cro. Car.* *p.* 553. A. D. 1639.

Trespass for entering and breaking his close and fishing *in separali piscariâ suâ*, and for taking *pisces suas ibid. viz.* an hundred eels, &c. After verdict, upon not guilty pleaded, and found for the plaintiff, and damages entire given.—Exception was taken in arrest of judgment by *Maynard* and *St. John*, that the declaration was not good to say *pisces suas*, for he hath not any property in the fish, until he takes them, and hath them in his possession.—But *Rolle* and *Grimston*, for the plaintiff, said, that being they were *in separali piscariâ suâ*, it may well be said *pisces suas*, for there is not any other may take them (*a*).—And of that opinion was all the Court, who severally delivered their reasons; for, for deer in a park, or conies in a warren, the owner hath a special property in them, as long as they are in the warren or park: so of doves in a dovecote. But for deer or conies, if they be not in a park or warren, he may not say *suas*, unless he add that they were domestic. Wherefore being taken out of his several piscary, and not *extra liberam piscariam suam*, the action is maintainable; and it was adjudged for the plaintiff. Vide 43 Edw. 3. pl. 24. 3 Hen. 6. pl. 55. 22 Hen. 6. pl. 59.

The owner of a several fishery hath a privileged property in the fish therein, and trespass will lie for taking them. Ante, 388. March, 48. Sir W. Jones, 440. S. C. Co. Lit. 122. 127. b. *in notis.* 7 Co. 17. Cro. Eliz. 195. F. N. B. 89. 3 Lev. 227. 5 Mod. 375, 376. 6 Mod. 183. 12 Mod. 144. Salk. 556. 637. Carth. 286. Ld. Ray. 250. 5 Com. Dig. 352. Dougl. 56.

(*a*) See Mr. Hargrave's note (7) to page 122. a. Co. Lit. 126. b.

Usher v. Bushnel. 13 *Car.* 2. *B. R. Sir T. Raym. Rep.* *p.* 16. A. D. 1662.

Trespass *vi & armis quare fasianos suos & perdices suas cepit;* and not guilty found for the plaintiff; and moved in arrest of judgment, because they are *feræ naturæ*, and therefore there cannot be any property in them: but adjudged for the plaintiff, because after verdict they shall be presumed dead, and then a property may be in them.

Trespass. If they were taken in the warren or wood of the plaintiff, they might be his pheasants. Cro. Car. 553. Child v. Greenhill. 1 Sid. 39. 1 Keb. 53, 60. 1 Ld. Raym. 650.

A. D. 1607. *The King v. Ryde.* 2 *Keble*, p. 74.

When a particular officer is appointed, no indictment lieth without special words. See post. that want of place is not ill. 43 Eli. cap. 3. 3 Jac. 13. 14 H. 8 16 pl. 3. per. Brudnell Pollard 8. Brooke.

Keeling, Chief Justice, conceived that inducement need not be certainly laid, but only the crime charged, but this is not sufficient, because the indictment doth not say that the warrant for distress was made by the same justices before whom the conviction was; also it doth not appear by the Stat. who should levy the distress, therefore the constable is not bound to execute all that justices of peace enjoin, at least not in pein of indictment for neglect, much less any other; also there is no place where the warrant was made, and likewise the Statute 13 Car. 2. cap. 10. tit. Dear-steal, is to levy by distress, and the warrant is to levy distress; all which exceptions the Court agreed, and per curiam the indictment was quasht.

A. D. 1668. *The King v. The Inhabitants of Rodley, in Gloucestershire. Hardress*, 437.

Upon a bill in equity, concerning common claimed by the inhabitants in the forest of Sheerwood, in certain lands there lately enclosed by the king and his patentees; it being a common by prescription, and the lands of the inhabitants there being now disafforested; whether this common be destroyed by the deafforestation upon the Statutes of Charta de Foresta, Ordinatio Forestæ, and 34 Ed. 1. was the question.

And by the opinion of Baron *Raynesford* and *Turner*, the common is gone by the express words of the Statute of Ordinat' Forestæ, and of 34 Ed. 1. And in an Iter, 8 Ed. 3. a judgment was cited in point in a like case, in this very forest of a common by prescription. But the Chief Baron doubted upon these grounds; *viz.* he said there were three manner of forests: First, ancient forests de temps dont, &c. before Charta de Foresta, called Charta Parva, with respect to Magna Charta, which passed in the same year. Secondly, There are new

forests made in the reigns of king Henry the Second, Richard the First, King John, &c. A third sort of forests are such as were partly ancient and partly new: In regard the ancient bounds of the forests were enlarged, and grounds taken into the forest that had not anciently belonged to it. And that is the reason of the saving in 9 Hen. 3. in Charta de Foresta, saving all commons accustomed, though the lands of the owners were disafforested by the act; because they had been afforested in the reign of King Hen. 2. or King John, &c. to the prejudice of the owners of the land, who had common there; and were not rightfully within the forest, and therefore it was but reason that upon the deafforestation of those lands, the owners should enjoy their customs; and this is the true ground of that saving in the act. But afterwards in 12 Hen. 3. and 10 Ed. 1. there were other perambulations; whereby many forests were enlarged, to the prejudice of the subject: and thereupon afterwards, in 28 Ed. 1. there was another perambulation made, by which the king conceived himself much prejudiced in abridging the bounds of the forest, and exempting lands out of the forest, which in truth were part of it. Upon these grievances on both sides, both to the king and subject, occasioned by these perambulations made after 9 Hen. 3. the king and his subjects concerned therein, came to an accord and agreement; and thereupon Ann. 33 and 34 Ed. 1. Ordinatio Forestæ was made; whereby it is declared by assent of both parties, that the deafforestations made upon those perambulations (be they right or wrong) should be quite discharged of the forest: but then the owners of the ground were not to have common there. But such who were content to continue their lands within the forest, were to have common, as they had used formerly to have it. A. D. 1668.

And this is the true state of the case upon these sta-

A. D. 1668. tutes. Which being admitted, it may be possible that the defendants here ought to have common, notwithstanding this deafforestation of their lands. For if their lands were not duly and of right afforested, and that they had common by prescription in the forest; it was not the intent of the Ordinatio Forestæ to toll such a common. But if they were well afforested at first, and afterwards disafforested unduly by some perambulation, then the common is lost, if the owner will have the land remain disafforested: and this is the true meaning, and interpretation, and intent of this act of Ordinatio Forestæ; and this being matter of fact, and it not appearing of what nature these lands are that are now disafforested, nor whether there be a common by prescription in the case; this cause is not yet ripe for a decree, which must be made one way or other, as the matter of fact shall guide us. And this is the first ground of my doubt.

Secondly, This act of Ordinatio Forestæ makes but a temporary suspension of the common law, *viz.* so long as the owners of the lands would be out of the forest, et non ultra: so that there cannot be in such a case an absolute decree, or a perpetual injunction.

My third reason is, because now by the Statute of 17 Car. I. 16. the lands cannot be afforested again; and therefore it would be hard to take away common, where it is due of right.

For these reasons he would not deliver any positive opinion in the case, which he said was a case of great importance, and deserved another kind of argument than upon an ordinary demurrer in law: which yet the Court never refuseth to hear upon the least difficulty (though the consequence be many times of small concernment,) that this cause deserved more consideration, than to be determined by a sudden opinion upon the hearing. But because the chancellor of the

exchequer, and the other barons were against him, the decree passed pro rege. A. D. 1668.

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1 *Levinz, p.* 203. *Rex v. Wetwang.* A. D. 1668.

Indictment for taking out of his pond certain fishes called carp fishes, being of the goods and chattels of J. S. An exception was taken thereto, That it is not said what number of fishes he took, which is ill in indictments, as well as in actions, 5 Co. Playter's Case; it is ill in actions, and indictments ought to be more certain than actions, or at least as certain, that so the defendant may know to what he is to answer. But *Kelynge* and *Windham* over-ruled the exception (and said) in actions damages are to be recovered, not in indictments, but the party is to be fined at the discretion of the Court, be it one fish or more, according to the circumstances of the fact, and not according to the number of the fishes.—*Twysden* to the contrary, That indictments ought to be as certain as actions. But (*Morcton* being silent,) the other two ruled the party to plead to the indictment.

Indictment for taking certain fishes called carp fishes, not shewing the number, good.

Wright v. Ramscot. 1 *Saunders, p.* 84. A. D. 1668.

Trespass.—The plaintiff declared that the defendant, on the 1st of April, in the 17th year of the now king, at Castleton, in the county of Derby, did beat, strike, and with a certain knife did stab a mastiff of the plaintiff, so that by reason thereof the mastiff died; and other wrongs, &c. The defendant pleaded in bar, that the plaintiff, on the same day and year, at the parish of Chapel in the Frith, in the same county, suffered his mastiff to go unmuzzled in the street, by reason whereof the mastiff run violently upon a dog of one Ellen Bagshaw, and did then and there bite the said dog (which dog the said Ellen kept in her house for the preservation thereof); wherefore the defendant, being the servant of

S. C. 1 Sid. 336. 1 Lev. 216. 2 Keb. 237.

It is no justification in trespass for killing a mastiff, "that he ran violently upon defendant's dog and bit him;" but the defendant should state further that he could not otherwise separate the

A. D. 1668.

mastiff from his dog (1).

the said Ellen, then and there killed the mastiff, that he might not do any further mischief. And this, &c.: wherefore, &c. Upon which plea the plaintiff demurred in law.

The law takes notice of a mastiff, hound, spaniel, and tumbler, as valuable things.

And *Saunders* of counsel with the plaintiff, argued that the plea was bad, because the law takes notice of a mastiff as a valuable thing; and there is an original writ for killing a mastiff in the *(a)* Register. And in Cro. Eliz. 125. *(b)*, it is said that the law takes notice of a mastiff, hound, spaniel, and tumbler *(c)*; and a man may justify a battery in defence of his dog, as appears in Rastall's Entries *(d)*. And in Cro. Jac. 44. *(e)*, trespass was brought for killing a mastiff; and there it is not doubted but the action well lies (2): but there the defendant justified, because the mastiff infested a warren, and could not be restrained doing damage there (3); but here the defendant hath done an injury to the plaintiff by making him lose a valuable thing without any cause; for the plaintiff is not bound by law to muzzle his mastiff, so long as he does no damage; and it is natural for one dog to bite or worry another; and therefore he ought not to be killed, unless it cannot be otherwise prevented. And here the defendant has not said that he could not otherwise part or take off the mastiff from worrying the other dog; and

(a) Reg. 109. a.

(b) Ireland v. Huggins, Ow. 95. S. C. In the report of which case in 3 Leon. 219. it is said the Court held trespass would not lie, but this is a mistake.

(c) 7 Rep. 18. a. the Case of Swans.

(d) 611. b. pl. 10. (1.)

(e) Wadhurst against Damme.

(1) The same plea is in Lib. Plac. 336. pl. 61. There is a similar precedent in Keck v. Halstead, 2 Lutw. 1494. where the justification was held good.

(1) S. P. Cro. Eliz. 125. Ow. 94. 2 Bro. Ent. 144.

(2) So is Ow. 94. Hob. 283. Edwards v. Engleton. Cro. Jac. 463. Athill v. Corbet. So will trover lie. 1 Roll. Abr. 5. pl. 5. So trover will lie for a parrot or monkey, because they are merchandise and valuable. Cro. Jac. 262. Grymes v. Shack.

(3) And it is not necessary to alledge, that he could not otherwise prevent the dog from killing the conies, but it is sufficient to state, that the dog was in the warren pursuing the conies there, and therefore he killed him. Cro. Jac. 44. So it is if a dog runs after deer in a park. 3 Lev. 28. Barrington v. Turner. See the form of a plea justifying killing a greyhound for running after deer in a park. 2 Rich. Pract. C. P. 435. 5th edit. The contrary indeed was held in 2 Rol. Abr. 567. (L), pl. 2. Lewin's Case; but that case was overruled. 3 Lev. 28.

if he had said so, it would have altered the case: and he might have justified the beating of the mastiff to preserve his dog, but not the killing of him, unless it could not be otherwise prevented. But in this case he says nothing more but that he killed the mastiff to prevent the other dog from being killed; whereas, for any thing that appears to the contrary, he might have saved the other dog without killing the mastiff: and so he has killed the mastiff without any necessity or cause, which is not justifiable; and he has not in any way excused that injury. And therefore he concluded that the plea was bad. And of that opinion was the whole Court; and judgment was given for the plaintiff. A. D. 1668.

Note.—There was another exception to the plea, namely, that the plaintiff laid the trespass at Castleton, and the defendant has justified at the parish of Chapel in the Frit; and yet his justification was not local but transitory, in which case he ought to have justified in the same place where the plaintiff has declared: but it was not moved. See for this Cro. Eliz. 174. (*a*), 184. (*b*). (1).

(*a*) Bullock v. Sir J. Smith.
(*b*) Cowleigh v. Edwards.

(1) See also Cro. Eliz. 705. Peacock v. Peacock. Ibid. 842. Purset v. Hutchings. 1 Lutw. 345. Pyke v. Pulleyn. Ibid. 618. 2 Lutw. 1437. Searle v. Dartford. 3 Lev. 113. Bridgewater v. Bechewey. Com. Dig. Pleader, 457. Ant. 11 Hawe v. Planner, note (1). In Carth. 326. Martin v. Wilsford, Ward, Chief Baron, said, it was a certain rule in pleading, that where the action is transitory, the defendant must follow the plaintiff, unless his justification is local, and then he must traverse absque hoc that he is guilty extra. See Ante, (8 a), note (2). 2 Saund. 5 c. 5 d. note.

The King v. Smyth. 2 *Keble*, p. 389. A. D. 1669.

Trespass.

Exception was taken to indictment of trespass for entering into his close called South Kelsey-warren, and killing two conies, price 10d. contra form' Stat'. and it was quashed per *Twisden*, (the rest being now absent,) because this is but a description of place, no positive affirmation that it is a warren.

A. D. 1671. *Sanders's Case. Saunders, p. 262. 22 Charles II.*

Surrey, } Be it Remembered, That on this instant the
to wit. } 21st day of April in the 21st year of the reign of our lord Charles the Second, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. one James Duel, of Walton upon Thames, in the county aforesaid, butcher, came before us Thomas Brend and George Brown, esquires, two justices of our said lord the king to keep his peace in the said county, and then and there, upon his oath, said and desposed, (1)

(1) Though the Statute 33 H. 8. c. 6. is now obsolete, as the object of it is a matter no longer in any use, yet the observations which arise upon this conviction, and the authorities cited in support of them, may perhaps be of some service in other cases.—This conviction appears to be very informal; it seems difficult to determine, whether what is stated to have been deposed by Duel upon oath be the information given, or only the evidence of the offence. In the first place, let us suppose it to be the information. It is true that the statute does not require that the information should be upon oath, but still it is conceived that the information would not be bad upon that account.—It is held, that a conviction ought to be founded upon a preceding information or complaint. 1 Ld. Raym. 509. Rex v. Fuller. This conviction is in the time past; in Rex v. Roberts. 2 Ld. Raym. 1376. 1 Str. 608. a conviction was quashed, because it was pre-titit sacramentum: but in Rex v Hall, 1. Term Rep. 320. it was held, that where the conviction was founded upon an information taken at a time past, it is better to state it in the time past, *viz.* that the informer came and gave the justice to be informed. The statute enacts, that no person, except he has in his own, or in his wife's right, lands, &c. of the yearly value of 100*l.* shall shoot in any hand-gun, &c. That exception is properly negatived in this case. It seems clear, that whenever a statute inflicts a penalty for an offence created by it, upon conviction before one or more justices of the peace, (but there is an exception in the enacting clause of persons under particular circumstances,) it is necessary to state in the information, that the defendant is not within any of the exceptions. 1 Str. 497. Rex v. Sparling. 2 Ld. Raym. 1386. Rex v. Tucke. 8 Term Rep. 542. Rex v. Jukes. And it seems immaterial whether the exception be in the same section, or a preceding section, or in a preceding act of parliament referred to by the enacting clause. As where in the fifth section of the Statute 1 Jac. 1. c. 22. it is enacted, that no person shall carry on the trade of a tanner, except under certain qualifications therein mentioned: the seventh section enacts, that no person shall buy, or contract for, any rough hides or calves' skin, in the hair, but such person as by virtue of that act might lawfully use the trade of a tanner, under a certain penalty. In a conviction upon this section, it was held not to be sufficient to set forth in the words of it, that the defendant was not such a person as by virtue of that act might lawfully use the trade of a tanner, but the conviction must particularly specify, that the defendant was not within any of the exceptions mentioned in the preceding section. 6 Term Rep. 559. Rex. v. Pratten. So in convictions on the game laws, the Statute 22 and 23 Car. 2. c. 25 s. 3. enacts, that all persons not having lands, &c. are thereby declared to be persons by the law of this realm not allowed to have or

that William Sanders, late of Walton aforesaid in the county aforesaid, yeoman, on the 28th day of Novem- A. D. 1671.

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keep dogs, nets, &c. and by a subsequent statute, 5 Anne, c. 14. s. 4. it is enacted, that if any person, not qualified by the laws of this realm so to do, shall, &c. he shall forfeit 5*l*. It is now fully settled, that in convictions upon the statute of Anne, the information must negative every one of the qualifications in the preceding statute of Car. 2. 1 Str. 66. Rex v. Marriott. 2 Ld. Raym. 1415. Rex v. Hill. Comyn. 522. Bluet v. Needs. 1 Burr. 148. Rex v. Maurice Jarvis. Ibid. 613. Rex v. Little. Dougl. 345. 3 edit. Rex v. Wheatman. In the King v. Jarvis, Denison, J. says, that not only the information must, but also the evidence and adjudication ought both of them to be that the defendant hath not the qualifications specified in the act; but in 1 Term. Rep. 125. 127. Rex v. Crowther, it is said, that there is no case, in which it has been directly decided, that the evidence should negative every particular qualification, and that it cannot be so from the nature of the case. The same point had been decided in a former case, 2 Ld. Raym. 1386. Rex v. Tucke, which was a conviction upon the statute of 6 and 7 W. 3. c. 11. for profane cursing, where the statute varies the punishment according to the rank and age of the offender; it was objected that it was not proved by the evidence stated in the conviction, that the defendant was not of a particular rank or age; but the Court overruled the objection, because, as it was alledged in the information, that he was not of such particular rank or age, and the evidence referred to the person mentioned in the information, that was sufficient; and see 1 East. 639. Rex v. Stone. But where the exemption is contained in a proviso in a subsequent section, or act of parliament, it is a matter of defence, and therefore it is not necessary to state in the conviction, that the defendant is not within such proviso; 1 Lev. 26. Whitwicke v. Osbaston; 1 Keb. 20. S. C.; 1 Strange 555. Rex v. Ford; 2 Str. 1101. Rex v. Bryan; Andr. 289. S. C.; 1 Term Rep. 320. Rex v. Hall; though Mr. Serjeant Hawkins seems to have thought it equally necessary to shew the exemption in both cases. 2 Hawk. P. C. 250. fo. edit.

In this case it was not necessary that the justices should have previously summoned the defendant, because he was brought before them; but it is a fundamental rule in general cases, that the party should be summoned before he is convicted. 1 Salk. 181. Rex v. Dyer. 2 Ld. Raym. 1405. Rex v. Venables, 1 Str. 630. S. C. 2 Barnard, 34. 77. 101. It is said there is no need to set forth the summons in the conviction, because the law intends that every magistrate will do his duty, and will punish him for a breach of it. Ibid. The defendant's appearance will in this case, as in other cases of process, cure not only all defects and informalities in the summons, but also the want of a summons. 1 Salk. 383. Rex v. Barrett. 1 Str. 261. Rex v. Johnson. It is enough that the conviction sets forth that the witness was examined upon oath, without stating that the magistrate had authority to administer the oath, 2 East. 193. Rex v. Picton. In this case it was not necessary to set forth in the conviction that the offence was proved upon oath, because the defendant confessed the charge before the justices, which is of itself the strongest evidence of the offence. 2 Burr. 1165. Rex v. Vipont. 1 Term Rep. 320. Rex. v. Hall. For though a statute should direct a conviction to be "upon the oath of one or two credible witnesses," without adding "or by the confession of the offender," yet a conviction, upon his confession before the justice, has been held sufficient; 1 Str. 546. Rex v. Gage. And what is still stronger, it has been held, that a confession made to others, and not to the justice, if proved by such persons to his satisfaction in the presence of the defendant, will be

A. D. 1671. ber, in the 20th year of the reign of our said lord the now king, at Walton aforesaid, in the county aforesaid,

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sufficient evidence to convict. Ibid. Where the defendant confesses the charge, it seems to be sufficient only to state in the conviction the information, the defendant's appearance, the confession and adjudication. But a confession will extend no farther than to the facts charged in the information; therefore if the offence be not brought by the information within the act of parliament upon which the conviction is founded, the defendant's confession will not make the conviction good. 1 Burr. 605. Rex v. Little.

In the next place let us suppose it to be only the evidence of the offence, in which light it seems to have been considered, as may be collected from other reports of the same case. 1 Sid. 419. 1 Ventr. 33. 39. and 2 Keb. 537. The statute gives the justice a power to convict upon due examination and proof of the circumstances before him, that is, by competent witnesses, 1 Ventr. 38. and directs a moiety of the penalty to be paid to the first bringer of the offender before him. But in this case, the person entitled to the moiety is the only witness who proves the offence. In Rex v. Drake, 2 Show. 489. and in Jennings v. Hankeys, 3 Mod. 114. which seems S. C. the defendant was convicted upon the single testimony of the informer, for unlawfully coursing of deer, upon the statute 13 Car. 2. c. 11. which enacts, that the offender upon conviction shall forfeit 20*l.* a moiety whereof to be paid to the informer; and though the objection was taken, that the witness was interested in the event, and therefore incompetent, yet the objection was disallowed, and the conviction affirmed. But that case has been denied in subsequent cases, and it is now fully settled and established, that an informer, who has a share in the penalty, is not a competent witness, unless a statute should specially so direct it. For which reason it is requisite to name the witness in the conviction, that it may appear that he is not the same person with the informer, 2 Ld. Raym. 1545. Rex v. Stone. 1 Str. 316. Rex v. Tilly. Andr. 18 Rex v. Piercy. Ib. 240. Rex v. Blaney. It does not appear here that the evidence was given in the presence of the defendant. It is essential it should be so, that he may have an opportunity of cross-examining the witnesses; and it must appear on the face of the conviction that the evidence was so given. 2 Burr. 1163. Rex v. Vipont; 1 Term Rep. 125 Rex v. Crowther; 6 Term Rep. 75. Rex v. Barwell; in which last case it is observed by Ld. Kenyon, that the precedent in Burn's Justice (title Conviction) is erroneous in not stating, that the witnesses were examined in the presence of the defendant. In 2 Ld. Raym. 510. Rex v. Fuller, Lord Holt says, that convictions ought to be certain, and not taken upon collection; and Lord Mansfield in Rex v. Little, 1 Burr. 613. says, that convictions ought to be taken strictly. However, it has of late been held, that if it appear on the conviction that the evidence was given on the same day that the defendant appeared and pleaded, the Court will presume that it was given in his presence. 3 Burr. 1785. Rex v. Aickin. Cowp. 241. Rex v. Kempson. 2 Term Rep. 18. Rex. v. Thompson. 7 Term Rep. 152. Rex v. Lovet. 8 Term Rep. 284. Rex v. Swallow. 1 East 639. 648. Rex v. Stone.

The evidence is set out in the principal case; for it is necessary that the evidence should be set forth particularly in the conviction, that the Court may judge whether the justice has convicted on proper evidence; 1 Str. 316. Rex v. Baker; 2 Str. 919. Rex v. Thead; Ibid. 999. Rex v. Lovd Andr. 81. Rex v. Bryan; 2 Burr. 1165. Rex v. Vipont; 3 Burr. 1063. Rex v. Kidet. and Rex v. Bissex, there cited; in which the case of Rex v. Pullen, 1 Salk. 369. is denied as to this point; Doug. 406. 3d edit. Rex v. Read, 2 Term Rep. 13. Rex v. Thompson; but in the case last cited, the Court was of opinion, upon the

had and kept a certain hand-gun, or instrument called a hand-gun, and then and there with the said hand-gun charged with gunpowder and hail-shot, unlawfully and unjustly did shoot, against the form of the statute in such case made and provided, the said William Sanders (2) then not having in his own right, or in the right of his wife to the use of the said William Sanders, nor any other person or persons having to the use of the said William Sanders, lands, tenements, fees, annuities or offices to the yearly value of 100*l.* And because the said William Sanders, being attached and brought before us the said justices, by the said James Duel, for the said offence, and charged with the said offence in form aforesaid, cannot deny the said offence; therefore it is considered by us the said justices, that the said William Sanders do forfeit (3) and pay the sum of 10*l.* according to the form of the said statute, one moiety of which A. D. 1671.

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authority of Rex v. Hartley, Cald. 175. that the evidence, stating generally in the language of the act of parliament, that the defendant did keep and use a gun to kill and destroy the game, was sufficiently set forth, and the same has been recognized in 6 Term Rep. 177. Rex v. Davis. The magistrate ought to state in the conviction the whole of the evidence for and against the defendant. 8 Term Rep. 210. Rex v. Clarke. But the magistrate is the sole judge of the weight of the evidence given before him. 8 Term Rep. 588. Rex v. Smith.

(2) The word then is necessary; for, perhaps, defendant had 100*l.* per ann. at the time he kept the gun, though not at the time of the conviction; see 3 Mod. 280. Rex v. Silcot. Sir T. Raym. 378. Rex v. Alsop.

(3) There must be a judgment of forfeiture; 2 Str. 858. Rex v. Hawks; Fitzg. 124. S. C.; 2 Burr. 1166. Rex v. Vipont; per Willmot, Justice, which see; see also 7 Term Rep. 238. Rex v. Harris; but 1 Salk. 378. Rex v. Chandler, is contrary; see also 6 Term Rep. 220. Rex v. Rhodes. Where the statute, upon which the conviction is founded, distributes the penalty in certain proportions, it is sufficient to state generally in the adjudication, that the penalty shall be distributed as the statute directs. 1 Salk. 383. Rex v. Barrett. But where the statute leaves it discretionary in the justices to distribute the penalty in such proportions as they shall direct, the distribution forms part of the judgment, and must therefore appear upon the conviction itself. 2 Term. Rep. 96. Rex v. Dempsey. Where an act gives power to a magistrate on a summary conviction to award the reasonable charges of taking a distress, he must ascertain the amount in the conviction; and an adjudication that the defendant shall pay the reasonable charges of the levy is bad. 1 East. 189. Rex v. Symonds. See 5 East. 339. Rex v. Patchett.

A. D. 1671. said sum of 10*l.* shall be paid to the use of our said lord the king, and the other moiety thereof shall be paid to the said James Duel, being the first bringer of the said William Sanders before us for the said offence, according to the form of the said statute; and that he the said William Sanders be committed to the next gaol of the said county, there to remain until he shall pay the said sum of 10*l.* to the uses aforesaid, according to the form of the said statute.

Sander's Case. 1 *Saunders' Rep. p.* 263. 21 *Car.* 2.

S. C. 1 Sid. 419. 1 Vent. 33. 39. 2 Keb. 521. 537. A conviction for shooting with a hand-gun before two justices to keep the peace, omitting the word assigned, quashed for that omission.

Sanders was convicted before two justices of peace for the county of Surrey, for having and keeping a hand-gun, and for shooting with it, against the form of the Statute of 33 H. 8. c. 6. for which he was adjudged to pay 10*l.* the one moiety thereof to the king, and the other to the party who brought him before the said justices, and was committed to prison in execution until he should pay the said 10*l.* And in Easter Term last he brought a habeas corpus, and a certiorari to remove the record of conviction into the King's Bench, and it was moved to be quashed for divers exceptions.

And now in this Term it was quashed for this exception, namely, that the conviction was said to be before Thomas Brent and George Brown, esquires, two justices of our said lord the king to keep his peace in the said county; but the word assigned was omitted, for it ought to have been assigned to keep; and so it does not appear whether the justices were assigned to keep the peace or not (5).

(5) It seems questionable whether the omission of the word assigned would now be considered a sufficient ground to quash the conviction. It is stated that they were justices of the king to keep his peace, that seems a sufficient description of their being justices of the peace, which is all that is required by the statute. From the report in 1 Vent. 33. it appears that another objection was taken to the conviction, that it wanted the words nec-non ad diversas felonias, &c. but the Court disallowed the objection, and took a difference between indictments before justices at sessions and convictions; in the former case it is necessary to add that part of their commission in a return to a certiorari, but not in the latter.

Note.—This conviction was before two justices of the peace; but the statute gives authority to one justice only, being the next justice of the county where the offence was committed, to commit the offender for the forfeiture. But it does not appear here whether any of the said two justices was the next justice or not; which was another exception that was intended to have been moved; but the conviction being quashed for the other exception above mentioned, it was not moved (6). *Gee*, and *Saunders* of counsel with the said *Sanders*. A. D. 1671.

(6) This, it should seem, would have been a fatal objection, for no other but the next justice has any jurisdiction by the statute. Dalt. Justice, c. 6. 3 Bac. Abr. 293. tit. Justice of the Peace. Dougl. 661. 3d edit. Rex v. Pitts. And the precedents are so. See in Burn's Justice, title Game, a precedent of a conviction upon this statute taken from Dalton. Sir W. Jones, 170. Cole's Case. 5 Rep. 71. b. St. John's Case. Where a statute says the next justice, it must be the next, but where it says justices of the peace in or near the place, any justice of the peace in the county will serve. 3 Bac. Abr. 293.

Patrick v. Greenway. 1 *Saunders's Rep.* 346. *b. in the Notes.*

In the Case of Patrick v. Greenway, tried before Mr. Justice Lawrence, Oxford Spring Assizes, 1796, which was an action of trespass for fishing in the plaintiff's several fishery; it appeared in evidence that the defendant fished there, but did not take any fish, neither was it alledged in the declaration that the defendant caught any fish, the plaintiff obtained a verdict, which in the following Term (East. 1796) the defendant moved to set aside; but the Court of Common Pleas refused even a rule to shew cause, upon the ground that the act of fishing was not only an infringement of the plaintiff's right, but would hereafter be evidence of an using and exercising of the right by the defendant, if such an act was overlooked. 2 East. Rep. 154.

A. D. 1671. *Timberley v. Grobham-How. Sir T. Jones, p. 5.*

Case by tenant at will for destroying his common of pasture.

Action on the case by a tenant at will, for destroying his common of pasture with the defendant's conies, and erecting a house on the common. The defendant pleads a grant by king James, of the manor of Bromsgrove, and a free-warren therein, and justifies, to which (there was) a demurrer.—*Brome per Quer.* The king cannot grant a free-warren to the prejudice of a commoner, 3 Cro. 462. Higham v. Best. Neither can the grant enable to build a house.—*Baldwin*, pro defend. confest the plea to be ill, but the declaration is not good, for the plaintiff being tenant at will ought not to have his action. Judgment for the plaintiff. *Et per cur.* It was said, that tenant at will from year to year, so long as it should please both parties, after the beginning of the year cannot determine his will to the prejudice of the lessor by his rent.

The King v. Birt, Ride, &c. 2 Keble, 530.

Forest. Trespass, B. 218.

On information for riot, it appeared that the defendants came by colour of a warrant from the master of the game to search for guns, nets, &c. the parties submitted to a fine, and per *curiam*, by such a warrant no house can be broken open, nor can the king grant a warren in another's soil but by prescription; but every man hath free warren in his own soil, and all other game.

Sanders' Case. 1 Ventr. p. 33.

1 Sid. 419. See ante, 944. S. C.

A conviction was certified of one, for carrying of a gun, not being qualified according to the statute, where the words in the statute are, upon due examination and proof before a justice of the peace.

The Court resolved, that that was not intended by jury, but by witnesses; and no writ of error lies upon such conviction.

And an exception was taken, because it was before such an one, justice of the peace, without adding nec non ad diversas felonias, transgressiones, &c. audiend assign'. And the Court agreed so it ought to be in returns upon certiorari's to remove indictments taken at sessions. But otherwise of convictions of this nature, for it is known to the Court, that the statute gives them authority in this case. A. D. 1671.

The King v. Saunders. 1 *Ventr. p.* 39.

Saunders was convicted before two justices of the peace upon the Statute of 32 H. cap. 6. for carrying of a gun. Which being removed by certiorari, was quashed, because it was coram nobis justiciariis domini regis ad pacem suam conservand', wanting the word assignatis. S. C. 1 Saund. 265. 1 Sid. 419. Ante, 33. 2 Keb. 521. 537. 691.

The King v. Marshall. 2 *Keble, p.* 594.

Lousdon, *Fielder*, and *Saunders* excepted to the indictment quod piscerunt in quadam piscina of J. S. and took and carried away divers fish in the night with nets contra form' Statuti of the queen, 5 Eliz. c. 21. but per *curiam* being not riotose assemblaverunt, but onely that vi et armis without licence et illicite, it was ill at the common-law, but on the statute it is well enough, but this is a word insensible, for which there is a proper word; and the Court agreed it was ill, but would not quash it without notice, but did nisi. Fish.

Pollexfen and Askford v. Crispin. 1 *Ventr. p.* 122. A. D. 1672.

Hill. 22 and 23 Car. 2. Rot. 225. The plaintiffs brought trespass, Quære pisces suos cepit in separali piscaria. 2 Keb. 757, 765.

Upon not guilty pleaded, and verdict for the plaintiffs, it was moved in arrest of judgment, that the plaintiffs ought not to have called them pisces suos, unless

A. D. 1672. they had been in a trunk or pond: for there is no more property in fishes in a *several* piscary, than in a free piscary.

53 Co. 31. b. F. N. B 192, 193. 2 Cro. 195. In an action for taking of conies in a warren, he shall not say cuniculos suos; and this is such a default as the verdict shall not aid. Sed non allocatur.

For the Chief Justice said, it might be intended a stew pond, which is a man's several piscary; and after a verdict the Court shall admit any intendment to make the case good.

Raym. 16. And *Twisden* cited a case which was in trespass; Quære phasianos suos cepit, and the plaintiff had judgment after verdict; for it shall be intended they were dead pheasants. And the case of Child and Greenhill, 3 Cro. 553. is the same with this.

1 Jones, 440. But the Court held, that it had been good upon a demurrer, by reason of the local property: and so is the register.

Bird v. West. Sir T. Jones, p. 21.

Want of a visne. Condition that the defendant shall not hunt in the plaintiff's warren. The defendant pleads that he did not hunt. The plaintiff replies that he did hunt, and shews when; the defendant demurs for not shewing where the warren lies, and so there can be no visne. Judgment for the defendant without argument.

Anonymous. Sir T. Jones, p. 25.

Where a statute gives a penalty to be levied by distress, it gives power to sell without other words. The defendant avowed on the Statute of deer-stealing, 13 Car. 2. c. 10. and shewed conviction thereon before a justice of peace, and distress for the penalty by the justice's warrant, and all well as to that. But the Court held that the defendant ought not to have avowed, but pleaded actio non, for the Statute saying that the penalty shall be levied by distress, gives power to sell, without other words. This case concerned the duke of Buckingham.

Ashford and Polyxphen v. Crispen. 23 *Car.* 2. 2 *Kebl.* A. D. 1672.
Rep. p. 757.

In trespass of fishing in *separali piscaria*, and taking Fish.
twenty *pisces suos*, it was excepted in arrest of judgment that this was ill, as in C. B. Saywell and Thorpe, *quare cuniculos*, where 1 Cr. 553. Greenhill's Case, was held spurious, as contra to the Case of Swans, 7 Co. 16. *sed per curiam* this is well enough, and they may now be intended dead; and judgment *pro* plaintiff *nisi*. *Post.*

Polyxphen v. Crispin. Hil. 22 & 23 *Car.* 2. *Rot.* 225.
Kebl. Rep. p. 765.

Winnington excepted in arrest of judgment in tres- Fish.
pass *de pisces suos in separalia piscaria* on 7 Co. 17. which is not aided by verdict, and a several piscary may be in navigable rivers as well as in private ponds, Dyer. 306. pl. Trover of a hawk, not said reclaim, 1 Cr. 399. *Child* and *Greenhill* is against the case, 2 Cr. *Grimes* and *Slack*, which is that conies in a warren cannot be said *meos*.—*Hale*, Chief Justice, said it is well enough, being not *quod piscatus est*, but founded on taking the fishing, which might be a stews, which is the most several of all, to which the Court agreed, and judgment *pro* plaintiff being after verdict, so *de phesianos suos* after verdict is intended dead, also he that hath possession hath property, regist' on demur.

Gaxdy v. Felton. 23 *Car.* 2. *B. R. Kebl. Rep. p.* 813.

Gardner on 13 Car. 2. cap. 10. prayed the filing of Forest.
a conviction for deer-stealing, being returned on *certiorari*, may be stayed, because if this Court be once possessed of the cause, they cannot execute it by reason of the express words of the statute which orders execution by warrant under that justice's hand that convicted, and *per curiam* it was remitted; but because *per curiam* error lieth not on such conviction no more than for

A. D. 1672. shooting with a gun, therefore whether it shall go back by *procedendo* or not, *adjornatur*. And on Monday following a *procedendo* was awarded.

Barrington v. Turner. 33 *Car.* 3. *Levinz's Rep. p.* 28.

A deer being in my land, I chased her with my dogs, who pursue and kill her in the park, the park-owner may kill the dogs.

Trespass *quare cepit & interfecit* two dogs called greyhounds. The defendant justifies, for that the said greyhounds chased a deer in his park, and there killed her, upon which to prevent more mischief by them, he took them and killed them. The plaintiff replied the deer was out of the park in the plaintiff's land, eating his grass, and that thereupon he hounded the greyhounds to chase the deer out of his land, and that they followed the deer into the park, and there killed her. Upon which the defendant demurred; and upon argument it was adjudged, that the replication was ill, because he does not say that he did his endeavour to stop the greyhounds at the side of the park to stay them from entering into the park. But then it was objected, that the bar was ill; for though it was not lawful to chase within the park, yet when the defendant took the greyhounds there, he ought not to have killed them; and for this they cited Roll. 2 Abr. 567. Lewis's Case. On the other side was cited 2 Cro. 44. Wadhurst v. Dam. and afterwards upon consideration of both these books judgment was given for the defendant.

Lord Fitzwalter's Case. 25 *Car.* 2. 3 *Kebl. Reports, p.* 242.

Fish.

Ex motione Sir *William Scrogs* against a new trial. —*Hale*, Chief Justice, said that wiers, as in Suffolk and Norfolk, may be particular in the main sea, 35 Ed. 1. Rot. 18. & Tr. 10 Ed. 2. Rot. 83. or on the shore, and yet the fishing may be and is common to all subjects: so in the Severn to the Lord Berkley, and in the Thames from the Bridge to Rochester, though the soil be the king's, yet *prima facie* the fishing is in the sub-

ject, but one may have a *piscary* in particular, exclusive of others in common river, and on release of damages to forty-two shillings, special verdict stands for the plaintiff on trial at the bar in action upon the case, for disturbing his sole and several *piscary* in Burnham River in Essex, from Clay-clods to Ray Sands, near twenty miles length; and the plaintiff's evidence was on Thursday last, by making many wiers *ad libitum*, the fishers by uninterrupted fishing. A. D. 1676.

Lord Fitzwalter's Case. 25 & 26 Car. 2. B. R. 1 Mod. Rep. p. 106.

A trial at bar concerning the river of Wallfleet. The question was, Whether the defendant had not the right of fishing there, exclusive of all others?—*Hale*, Chief Justice. In case of a private river, the lord's having the soil is good evidence to prove that he hath the right of fishing; and it puts the proof upon them that claim *liberam piscariam*. But in case of a river that flows and reflows, and is an arm of the sea, there, *primâ facie*, it is common to all: and if any will appropriate a privilege to himself, the proof lieth on his side; for in case of an action of trespass brought for fishing there, it is, *primâ facie*, a good justification to say, that the *locus in quo* is *brachium maris, in quo unusquisque subjectus dom. regis habet et habere debet liberam piscariam*. In the river Severn there are particular restraints, as gurgites, &c. but the soil doth belong to the lords on either side: and a special sort of fishing belongs to them likewise; but the common sort of fishing is common to all. The soil of the river of Thames is in the king; and the lord mayor is conservator of the river,

A person claiming a free fishery, a several fishery, or a common of fishery, must shew the foundation of his claim; for the right is *primâ facie* in all the king's subjects, or in the owner of the soil.
S. C. 3 Keb. 212.459.555.
S. C. 2 Lev. 139.
S. C. 1 Free. 414.
6 Mod. 73.
2 Salk. 537. 637.
1 Salk. 357.
3 P. Wms. 257.
Davis's Rep. 55.
16 Viner, 354.

See the case of the royal fishery of the river Bann in Ireland, Dav. Rep. 149. Salk. 137. Carter v Murcot, 4 Burr 2162. 2165. Seyman v Courtness, 4 Burr. 2814. 2 Bl. Com. 139 The Mayor of Lynn v. Turner, Cowp. 86. [illegible]. 448. 517. 3 Term Rep. 253. The Mayor of Orford v [illegible]ardson, 4 Term Rep. 437.

A. D. 1676. and it is common to all fishermen: and therefore there is no such contradiction betwixt the soil being in one, and yet the river being common for all fishers, &c.

Triggs v. Turner. Pollexfen's Rep. p. 443.

The plaintiff declares, that the defendant 1 Jan. 27 Car. 2. at Binsted in the County of Southampton, in a certain place called Alice Holt, took his cattle.—The defendant says, the place where is called Alice Holt, parcel of the forest of Alice Holt, and that, as bailiff to the king, he took the cattle damage fesant.—The plaintiff in bar saith, that he is a copyhold tenant to the Bishop of Winton, and that the bishop time out of mind hath had common in the place where for himself and tenants *pro omnibus magnis averiis omni tempore anni.* —The defendant acknowledging the tenure, traverseth that the bishop hath not right of common in the place where *pro omnibus magnis averiis omni tempore anni.* —The plaintiff takes issue upon the traverse, which is tried and found for him.—Moved in arrest of judgment: that by law a man cannot prescribe for common in a forest for rother beasts all times in the year: for, say they, in the fence-month no common can be.—I cannot find any positive authority to maintain this position: those that may infer something to this purpose, are *Manwood*, 206. that sheep, goats, and swine are to be forfeit if found in the forest in the fence-month. *Ibid.* 209, 210. The articles for the fence-month provide against driving swine into the forest to feed, against foreigners driving cattle into the waste soil to agist. Ibid. 235. It seemeth that by the assizes of the forests of Pickering and Lancaster, that the officers there did use to make two drifts yearly; the first fifteen days before Midsummer, at the beginning of the fence-month; because in that month no man might have beasts commoning within the waste soil of the forest. But this seems to be no direct authority, perhaps it is meant of those two forests of

Pickering and Lancaster only; next it goes only to the waste soil of the forest.—*Jones*, 283. It is said that Mr. Attorney *Noy* said, that it was inquirable whether any put in their cattle to common in the fence-month; perhaps it is unlawful to put in then, yet it may be lawful to common then, they might put in before, and take out after, not put in then. These are all the authorities which I can find.—1. In this case, this question comes in by the bye; for it is not pleaded that this is a forest where the king keeps his beasts, or where there are any courts: it may be a place called a forest, as we know there are many in many places of England: but in books there is notice taken betwixt forests in name, and forests in law.—4 Inst. 298. A question was put to all the judges assembled, 5 Jac. about the king's forests of Leicester and Prowland, whether they were forests in law or in name only? To which the judges answered, that it was a question of fact; but that it must appear upon record, that they had courts, officers, &c. But the book saith expressly, that appellation or naming them forests in offices, pleadings, grants, or conveyances, is no proof that they are forests in law: and there have been by King John, and other princes, many deaforestations, and yet the names continue still.—2. If this should be taken, as here pleaded, to be a forest in law; yet I conceive that a man by prescription may have common for rother beasts all times of the year.—It must be granted that a forest may be made by charter at any time; that this charter, nor the making the forest, takes not away the ownership of the soil, but the owner at all times of the year shall feed, though within the forest: And if the owner himself may feed, why by the same reason shall not he who claims common in the same land, by grant or prescription?—By the statute De Char. For. c. 1. which hath been confirmed thirty times; it is provided, That if the A. D. 1676.

A. D. 1670. king afforest his own woods, that those who had common of herbage, and other things which before they were accustomed to have, should still enjoy the same: And *Manwood*, 217. 219. speaking of this matter, saith, That the king by an afforestation of lands, woods, or pastures, doth not at any time restrain, abridge, or prejudice any man of his right or interest of common for such beasts as are commonable; but upon all such afforestations, the common of herbage is reserved as it was at common law. Nothing can be more express than Manwood is herein, that every man's right of common in forests is reserved and left remaining in the same degree as it was at common law before the lands were afforested, and argumentatively the same may be proved out of many other places in Manwood; as in fol. 206. That sheep, goats and swine, are to be forfeit if found in the forest in the fence-month; which implies that other cattle may be there in the fence-month. Ibid. 209, 210. The articles for the officers to observe in the fence-month, provide against driving swine into the forest in the fence-month, and against foreigners driving their cattle into the waste soil of the forest in the fence-month to agist there, shews that commoners may then feed there: for otherwise, why provision against foreigners, if by the law none could feed there? As to the objections, *Manwood*, 235. says, That by the assizes of the forests of Pickering and Lancaster, the officers did use to make two drifts yearly; the first was fifteen days before Midsummer, at the beginning of the fence-month; because in that month no man might have beasts commoning within the soil of the forest: this is only said by the bye, and not in any his intended discourse of common, as the rest before-mentioned of the other side are: here he is discoursing of drifts and not of commons, there of commons: here he speaks of these two forests Lancaster and Pickering, and perhaps it may

be so there but not in others.—*Jones*, 282. It is only said, that Mr. Attorney *Noy* did say, that it was inquirable whether any put in their cattle in the fence-month: this may be true, and perhaps of all those that live in the purlieus, and the agisters of cattle, that those should not put in their cattle to common in that month, but not generally of those that have common by prescription *temps d'ont*.—But if intended to be spoken generally in those books; yet as it is in the common law, so is it in the forest. The general law may be true, and yet particular custom or prescription shall controul and be good, though contrary to it: and therefore these places which are against me, not speaking particularly where there are prescriptions, and not so full against me as is imagined; but those that are for me expressly take notice of prescriptions and claims of common, and therefore the more plain and full for me.—Next, every thing that is said by Mr. Manwood is not gospel concerning those laws: for he saith, 1. That a man cannot have common for sheep in a forest. 2. That by the law of the forest, a man cannot cut his woods without the forester's leave. 3. That warrens or parks may not be within forests; but in the Case of the Forest of Leicester it was resolved by all the judges of England, that by special prescription, a man may have common for sheep, may cut his woods without licence, and have park or warren.—And my Lord *Coke* saith much to the same purpose, and that the laws of the forest are allowed and bounded by the common law.—Judgment for the plaintiff.

A. D. 1676.

2 Crook, 155.

4 Inst. 298.

Barnish v. Killick. Freeman's Rep. p. 407.

Trespass for fishing in his several piscary, & *quod pisces suos cepit*, and doth not say of what kind, or how many.—And *Hale* seemed to incline that it was nought; for if a man should declare in trespass for taking *averia*

Pisces suos.

1 Cro. 554.

A. D. 1676. *sua*, or *pullos suos*, he said it would not be good, according to Plater's Case, 5 Co. 34. *Sea adjournatur. Sed Freem. Rep. Case* 61 *contra.*

Anonymous. Freeman's Reports, p. 409.

Deer-stealing. Justice of peace's jurisdiction.

Memorandum, upon the statute of 13 Car. 2. of deer-stealing, where a conviction was had before a justice of peace, the Court will send a *certiorari*, and examine the regularity of the proceedings.—But *Hale* held, they could not send such process out of this Court; but if they saw cause they would remand the parties, if they came by *habeas corpus*, or if it came by *certiorari*, and the conviction was fair, they would send down the record; but in this case, the purchase being foul, the Court ordered that proceedings should stay, and they would take time to consider of it till Michaelmas Term.

Aston v. Lyder and Sadler. 26 *Car.* 2. *B. R.* 3 *Kebl. Rep. p.* 364.

Forest.

In ejectment of lodge, chase and warren, or a lease of the Lord Buckhurst; the defendant confessed ouster of lodge and chase and warren, but of no soil more than of the lodge; the plaintiff's evidence was by grant of the manor excepting the chace, which 1 Inst. 5. was said to include the soil. And 2. That a chase doth necessarily include a warren. 3. The defendants excepted that they had been in possession above twenty years, and so the plaintiff's entry not congeable. But by Twisden, 32 H. 8. cap. 2. § 3. extends not to a common, and there is the same reason of a franchise and this, and whether ejectment lieth of these liberties, 1 Cr. 492. pl. 571. was saved to be found specially. 4. The reversion in the king would privilege the lessor of the plaintiff, being but a lessee for ninety-nine years, against such want of possession, but in this case there version was granted out of the crown, and if it were not, the

defendant justified that entry of the disseisor will turn the lessees possession to a right, though it hurt not the king's reversion. 5. The original grant from the crown was of the manor (excepting the chase) with all warrens, which the defendant said was a deer chase, but it appearing the warren in question was of lesser extent than the chase, and so the grant of reversion by the crown, which is particular of the chase or warren of conies, excepting the chase generally, is intended for deer, and cannot be of the warren, unless the warren were larger than the chase, then it might be good, for warren is not within the chase. And Manwood, 121. the warren and chase may be distinct liberties, in the same soil in the crown, though generally one be included of the other, and found that the king was seised of the manor and chase and warren therein; but the Court would not permit to find actual ouster of the lessees of the king, but only that the defendant hath been and is possessed, because they were nominal trustees for Prince Henry, and were never actually in possession, and thereby their latter assignments would be void. A. D. 1676.

Dominus Rex and Shore. 26 Car. 2. 3 Kebl. Rep. p. 425.

Ex motione Bigland for *certiorari* to remove presentment at Lincoln assizes, against the defendant for using a warren in the common of D. without the king's licence, which was granted. And *Twisden* said no presentment would lie, but action upon the case, or parties may kill the conies, which was not denied. Forest.

Anonymous. 27 Car. 2. 1 Ventris' Rep. p. 272.

In trespass for fishing in his several fishery *et pisces cepit*. After a verdict for the plaintiff, it was moved, in arrest of judgment, that the plaintiff ought to have alledged what kind of fishes and the number of them as in Playter's Case, 5 Co. is. But for that it was said on 1 Ventr. 329.

A. D. 1676. the other side, that at that time they were more strict in the certainty of pleading than since, for now an *indebitat' assumpsit* for work done, or goods sold, is allowed without further certainty. And that however the Oxford Act, 15 Car. 2. here helped it; for though this be none of the defects there enumerated; yet the words of the act being, That judgment shall not be arrested for any other exception that doth not alter the nature of the action, or trial of the issue, shall extend to this case. But the Court were of opinion, that none of the acts had aided this case, in regard, that there was not so much as the number of the fishes expressed; as if a man should bring trespass for taking of his beasts, and not say what. But *Hale* said, trover for a ship *cum velis* had been allowed, because all made but one aggregate body, both the ship and sails. But trover *pro velis* would not be good. Vide 2 Cro. 435. Trespass *quare clausum fregit & spinas cepit*, and 3 Cro. 553. Child and Greenhill's Case.

Dominus Rex v. Lord Fitzwalter. Ante. 27 *Car.* 2. *B. R.* 3 *Kebl. Rep. p.* 485.

Fishing. *Maynard* excepted in arrest of judgment, the *visn* being of one Hill, on prescription to several, that this at common-law is ill, *Hub.* and is not aided by the statute, being in case of the king, though as on the Statute of Limitations, if verdict be for the king it might be aided; but *per curiam* the case is all one at common-law, though *Jones*, 320. & 1 Cr. 226. 312. the Statute of *Jeofails* extended not to information of free-warren in D. in the manor of R. where the prescription was for warren in all the manor on Ven. Fa. of the will only; yet by Sir *William Scrogs* it is aided by 16 & 17 Car. 2. cap. 8. being a remedial law, in favour of justice; and indictments are excepted; therefore what concerns the king in property or mere profit is included, as on

1 Eliz. cap. 19. 11 Co. 1. and this exception shews A. D. 1676.
that indictments had been included, if not excepted: And in Jones, 320. the Ven. Fa. was not to go from the manor and the will, but only from the manor, and so doth not fully conclude this case, which the Court agreed: Statutes for quieting possessions of offices, or in suppression of fraud, bind the king without naming. —*Hales*, Chief Justice, the exception on 18 Eliz. shews the law-makers thought suits and demands would have included indictments and appeals, had the proviso not been.—*Rotheram* for the plaintiff, on Roll. 156. & 2 Inst. 681. that the king had no original prerogative here, as on the Statute of Limitations he had: Also this is to suppress a wrong, Mich. 1651. Stiles, 307. Theobald's Case. Statute that aids information on penal laws, aids all process thereon; and the Court inclined strongly for the plaintiff.

Burnage v. Killing & Hall. 27 Car. 2. 3 Kebl. Rep. p. 507.

Sergeant *Pemberton* prayed judgment in trespass Fish.
quod pisces suos cepit, not said of what kind, as Co. Playter's Case, on Child and Greenhill's Case, this being aided by verdict, especially on 16 & 17 Car. 2. cap. 8. the nature of the action, nor trial of the issue being not hereby altered to shew what fishes, for these must be particularly shewed in evidence, and the damages being ascertained.—*Hales*, Chief Justice, on fishing in *separalia piscaria*, and taking *inde anguillas*, &c. it is usually said what number, *à fortiori* here, which is as general as taking cattle, or cheeses, or *pullos equinos*, not shewing the kind or number; both which are uncertain and void.—*Brewer*, for the plaintiff, insisted upon the authority of 2 Cr. 435.—*Jones* and *Cook* and *Haywood*, *quod clausum fregit & fructum suum cepit*, ruled good.—By *Glyn* that the main is the

A. D. 1676. fishing ; *sed non allocatur*, for the evidence of cattle may be the same : and in B. R. agreed,
trover of a ship, *cum vergis & remis*, not shewing the number, good ; but *de vergis* alone without number is ill : but in Napper's Case in the Exchequer,
trespass of taking *fera domita*, not saying what number, held well enough by verdict ; *sed adjornatur*.

Anonymous. 27 Car. 2. B. R. Ventris' Rep. p. 272.

Ventr. 329. In trespass for fishing in his several fishery & *pisces cepit*. After a verdict for the plaintiff, it was moved in arrest of judgment, that the plaintiff ought to have alledged what kind of fishes and the number of them as in Playter's Case, 5 Co. is. But for that it was said on the other side, that at that time they were more strict in the certainty of pleading than since, for now an indebitat' assumpsit for work done, or goods sold, is allowed without further certainty. And that however the Oxford Act, 15 Car. 2. here helped it ; for though this be none of the defects there enumerated, yet the words of the act being, that judgment shall not be arrested for any other exception that doth not alter the nature of the action, or trial of the issue, shall extend to this case. But the Court were of opinion, that none of the acts had aided this case, in regard, that there was not so much as the number of the fishes expressed ; as if a man should bring trespass for taking of his beasts, and not say what.—But *Hale* said, trover for a ship *cum velis* had been allowed, because all made but one aggregate body, both the ship and sails. But trover *pro velis* would not be good. Vide 2 Cro. 435. Trespass quare clausum fregit & spinas cepit, and 3 Cro. 553. Child and Greenhill's Case.

Wine v. Rider & Others. 27 & 28 Car. 2. 2 Mod. Rep. p. 67.

In trespass against five Trespass against five, quare clausum fregerunt, and

took fish out of the plaintiff's several and free fishery. Four of them pleaded not guilty; and the fifth justified, for that one of the other defendants is seised in fee of a close adjoining to the plaintiff's close; and that he and all those, &c. have had the sole and separate fishing in the river which runs by the said closes, with liberty to enter into the plaintiff's close, to beat the water for the better carrying on of the fishing; and that he, as servant to the other defendant, and by his command, did enter; and so justified the taking; absque hoc that he is guilty aliter vel alio modo. The plaintiff replies, that he did enter de injuriâ suâ propriâ; absque hoc that the defendant's master hath the sole fishing. The defendant demurs.—*Newdigate*, Sergeant, argued for the defendant, that the justification is good; for when he had made a local justification, he must traverse both before and after, as he has done in this case.—Secondly, The plaintiff's replication is ill, for he ought not to have waved the defendant's traverse, and force him to accept of another from him; because the first is material to the plaintiff's title, and he is bound up to it, Hob. 104.—Thirdly, There was no occasion of a traverse in the replication; for where a servant is defendant, de injuriâ suâ propriâ is good, with a traverse of the command.—*Baldwin*, Sergeant, on the plaintiff's side, held the defendant's traverse to be immaterial; for having answered the declaration fully, in alledging a right to the sole fishing, and an entry into the plaintiff's close, it is insignificant afterwards to traverse that he is guilty aliter vel alio modo. Then the matter of the plea is not good, because the defendant justifies by a command from one of the other defendants, who have all pleaded not guilty; and they must be guilty if they did command him, for a command will make a man a trespasser.—The Cour were all of opinion, that judgment should be given for the plaintiff: for as to the last thing mentioned, which

A. D. 1676.

for fishing in a several and free fishery, one of the defendants may plead property in his master, and that he did it by his command, and traverse the right of free fishery stated in the declaration; and the defendant may reply, de injuriâ suâ propriâ. Cro. Jac. 45. 372. 1 Term Rep. 437.

A. D. 1676. was the matter of the plea, they held it to be well enough; for the servant shall not be ousted of the advantage which the law gives him by pleading his master's command (*a*).—Then as to the replication it is good, and the plea is naught, with the traverse; for where the justification goes to a time and place not alledged by the plaintiff, there must be a traverse of both.—In this case, the defendant ought to have traversed the plaintiff's free-fishing, as alledged by him in his declaration; which he having omitted, the plea for that reason also is ill. And so judgment was given for the plaintiff.

Hob. 101. Carter, 207. 1 Lev. 211. 4 Bac. Abr. 79.

(*a*) Mines v. Solebay, post. 242.

Hevel v. Reynolds. Sir Tho. Jones, p. 109.

Incertainty in the continuando.

Trespass for fishing in his several piscary, and taking of one hundred bushels of oysters on one day, the fishing, taking, and carrying away of the oysters, diversis diebus et vicibus unto another day continuando. Upon not guilty, found for the plaintiff, and entire damages given. In arrest of judgment it was moved by Barel, sergeant, that the declaration for the taking and carrying away of the oysters in the continuando was ill, not expressing any certain quantity; therefore the entire damages make the verdict vicious; and for this he cited the Case of Playters, 5 Co. And judgment by *Twisden*, *Wild*, and *Jones* (*Scrogs* dissenting) that the plaintiff nil capiat per Billam.

Brownl. p. 1. fol. 223. N.B. 91. F. Trespass, 51.

Hovel and Reynolds. 1 Ventris, p. 329.

T. Jones, 109. In trespass for fishing in his several piscary, and for taking 20 bushels of oysters there such a day, continuando piscationem prædictam from the said day to the time of the action brought.

Ante, 271. Upon not guilty pleaded, and a verdict for the plaintiff it was moved in arrest of judgment, That the fishing in the continuando was altogether uncertain, not expressing

the quantity or quality of the fishes as it ought, according to Playter's Case, 5 Co. and of this opinion were *Wylde* and *Jones*. A. D. 1676.

But the Chief Justice inclined to think it well enough and said Playter's Case had not been very well approved of late years, and that is, that it is necessary to express the kind of the fishes, which has been held since needless; and he knew not why it might not be, as well as an indebitatus assumpsit pro diversis mercimoniis. But the other judges said, though it was reason it should be as the Chief Justice said, yet they knew not how to depart from the authorities in the point, and that Playter's Case had remained unshaken. Sed adjournatur.

Dominus Rex v. Alsop. Sir T. Raymond, p. 378.

Game. 3 Keb. 516. S. C.

The defendant was indicted at the quarter-sessions, That he non habens terras tenementa feod. annuitat. reddit vel officia in jure suo proprio vel in jure uxor. ejus ad usum suum propr. nec aliqua alia persona sive aliquæ aliæ personæ ad usum ipsius Thomæ vel uxor. ejus vel ad usum eorum alterius annui valor. *100l.* 9 die Novemb. 31 Car. 2. apud Boylston Sagittavit in quodam tormento Anglice vocat. a hand-gun, contra formam Statut. in hujusmodi casu edit. et provis. ac contra pacem dicti D'ni Regis nunc Coron. et Dignitat. suas. The defendant pleads not guilty, and found guilty; and judgment is entred thus: Ideo consideratum est per Cur. dicti D'ni Regis nunc hic quod præd. Thomas Alsop solvet dicto D'no Regi secund. formam Statut. in hujusmodi casu edit. et provis. decem librar. pro fine suo super ipsum occasione præd. imposit. Et quod præd. Thomas Alsop capiatur ad satisfaciend. D'no Regi de fine præd', &c. The defendant assigns the general error. But the errors insisted upon were these. 1. Non habens terr. refers to the time of the indictment, and not to

A. D. 1676. the shooting; and so he may have 100*l.* per annum when he did shoot, and may have parted with it at the time of the indictment, as 3 Cro. 754. Stansbie's Case. An indictment of forcible entry into lands existen. liberum tenementum of the party, is not good, for not saying adtunc existen. 2. The judgment is solvet for solvat. 3. Decem librarum for decem libras; and for these reasons judgment was reversed.

Barrington v. Turner. 3 Levinz. 28.

A deer being in my land, I chased her with my dogs who pursue and kill her in the park, the park-owner may kill the dogs. 1 Saund. 84, 85. 220. 1 Lev. 216. vide Cro. Eliz. 125. Cro. Jac. 44. 2 Lutw. 481.

Trespass quare cepit et interfecit two dogs called greyhounds. The defendant justifies, for that the said greyhounds chased a deer in his park, and there killed her, upon which to prevent more mischief by them, he took them and killed them. The plaintiff replied, the deer was out of the park in the plaintiff's land, eating his grass, and that thereupon he hounded the greyhounds to chase the deer out of his land, and that they followed the deer into the park, and there killed her. Upon which the defendant demurred; and upon argument it was adjudged, that the replication was ill, because he does not say that he did his endeavour to stop the greyhounds at the side of the park to stay them from entering into the park. But then it was objected, that the bar was ill; for though it was not lawful to chase within the park, yet when the defendant took the greyhounds there, he ought not to have killed them; and for this they cited Roll. 2. Abr. 567. Lewis's Case. On the other side was cited 2 Cro. 44. Wadhurst v. Dam. and afterwards upon consideration of both these books, judgment was given for the defendant.

The King v. Briggs. Sir Tho. Jones, p. 167.

Certiorari on a judgment by two justices of the

Upon a conviction (for hunting in a park against the Statute, and judgment for the penalty of 20*l.* given by the Statute) removed to B. R. by certiorari, it was

moved to quash this record for insufficiency, and the Case of Berry, Roll Abr. 1 part, 743. pl. 11. was cited, where by *Croke* and *Brackley* a conviction for killing of partridges with nets before two justices of the peace, and judgment thereupon according to the Statute of 7 Jac. cap. 11. may be reversed without writ of error, and in their opinion, in like manner, on the Statute against shooting. But by *Pemberton*, Chief Justice, the party ought to be put to his writ of error, and he was not then permitted to quash or reverse it by motion on the certiorari. But afterwards *Pemberton* assenting, exception was taken to the said judgment by motion on the certiorari.

A. D. 1676. peace for 20*l.* on the Statute against hunting in parks.

Sir George Fletcher's Case. Raymond, p. 458.

In replevin. The defendant avows upon the Statute of 13 Car. 2. cap. 10. for killing of deer, and that the plaintiff was aiding to the killing of deer in the avowant's park; the plaintiff pleads in bar, that she was not aiding, and issue thereupon, and verdict for the plaintiff.

Deer-stealing. Trem. 322.

And it was moved for the avowant, that the issue is a jeofail, because it is an immaterial issue; for the aiding was found before a justice of peace, and shall not be tried over again. I was not at the resolution of the Court; but it seems plain that the Statute of 32 H. 8. cap. 30. helps misjoining of issues. 3 Cro. 778. Dighton v. Bartholomew, Goldsb. 39. pl. 15.

Pasch. 1657. B. R. Spathurst versus Overind, error in C. B. debt upon a bond against Gr. Spat, as executor of J. Spat. The defendant pleads it is not his deed; the jury find it is the deed of Spat, as the plaintiff declared. And in error judgment affirmed, because here was an affirmative and a negative, and by the jury's finding the plaintiff had cause of action.

If the bar be good, and the replication naught, and

A. D. 1676 issue be taken upon it, they shall replead to the replication, and the bar remains; and so if the bar is good, and the replication good, and the rejoinder naught, and issue taken upon it, they shall replead to the rejoinder, and the bar and replication remain: but if the bar is naught, and the replication good, and issue taken upon it, they shall replead for the whole anew, because the bar was nought. Long, 5 E. 4. 109. a.

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The King v. Foot and others. 2 *Shower*, p. 442.

An indictment for breaking a park, and killing dee, the goods and chattels of A. concluding cont. for. stat. is good. 1 Comb. S C. 69.

Indictment for breaking and entering a park, and for hunting and killing fallow deer of the price of forty shillings, of the goods and chattels of the aforesaid Richard Strode.

I moved to quash it.

First, Because it concluded contra formam statuti, and therefore naught, because there is no statute against breaking the park, but only against chasing, hunting, and killing, &c. (*a*)

Secondly, It was said a deer "the goods and chattels of, &c." which could not be unless tame.

But without any answer to my exceptions the Court refused to quash it, and bid us to plead or demur.

(*a*) See 5 Geo. 1. c. 26. and 16 Geo. 3. c. 30.

Mallocke v. Eastly. 3 *Levinz*, p. 227.

No property of deer in a park, except tame and reclaimed.

Trespass quare duas damas ipsius the plaintiff, in a certain close of the plaintiff's called the Park, he took and carried away. The defendant demurred generally, and judgment was given for him, for that the plaintiff says damas ipsius, and none can have property in deer, except they are tame and reclaimed, although they are in a park, 7 Co. 17. b. But here it does not appear that they were in a park, but only in a certain close called the Park.

Upton v. Dawkin. 3 *Mod. Rep. p.* 97. A. D. 1685.

Trespass for taking fish ipsius querentis in liberâ piscariâ is not good, though after verdict. S. C. Comb. 11. 8 Mod. 165. 272. 370. 10 Mod. 25. 37. 140. 251. 12 Mod. 96. 301. 383. 1 Stra. 503. 610. 637. 2 Stra. 820. 1 Ld. Ray. 239. 251. 276. 1 Term Rep. 480.

Trespass quare vi et armis liberam piscariam he did break and enter, and one hundred trouts ipsius quer. in the fishery aforesaid did take and carry away. Upon not guilty pleaded, there was a verdict for the plaintiff. Exception was taken in arrest of judgment, For that the plaintiff declared in trespass for taking so many fish ipsius quer. in liberâ piscariâ, which cannot be, because he hath not such a property in liberâ piscariâ to call the fish his own.—*Pollexfen, contra.* If there had not been a verdict, such a construction might have been made of this declaration upon a demurrer; but now it is helped, and the rather because a man may call them pisces ipsius in a free-fishery; for they may be in a trunk *(a)*, so a man may have a property though not in himself *(b)*: as in the case of joint-tenants, where it is not in one, but in both; yet if one declare against the other, unless he plead the jointenancy in abatement the plaintiff shall recover. But, notwithstanding, the judgment was reversed.

(*a*) See Lord Fitzwalter's Case, 1 Mod. 106; Carter v. Murcott, 4 Burr. 2162; Seyman v. Courtness, 5 Burr. 2814.; Mayor of Lynn v. Turner, Cowp. 16.; Mayor of Orford v. Richardson, 4 Term Rep. 437. And 2 Black. Com. 139. Dougl. 56. 443. 517. 3 Term Rep. 253.

(*b*) See Smith v. Miller, 1 Term Rep. 480. and Ward v. Macauley, 4 Term Rep. 489. that trespass may be maintained on a constructive as well as an actual possession.

The King v. Drake. 2 *Shower, p.* 476.

Record returned by certiorari, of a conviction on the Statute 13 Car. 2. c. 10. for hunting deer in a park. S. C. Comb. 35.

Devon, ss. Memorandum quod quarto die Augusti anno regni domini nostri Jacobi secundi dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ regis, fidei defens. &c. primo, Johannes Sheffield de Plympton beatæ Mariæ in com. Devon. gen. apud Olleton in eodem com. venit coram nobis Richardo Hillersden et Thoma Hele arm. duobus justiciar. dict. domini regis ad pacem in com. præd. conservand', ac ad divers. felon. transgr. et

[A. D. 1685.

Ante, Case 419.
4 Com. Dig. "Justice of "the peace." (B. 47.)

al' malefacta in eodem com. perpetrat. audiend. et terminand. assignat. et præstitit sacrament. suum corporale coram nobis (eodem Johanne Sheffield adtunc existen. credibili teste in hac parte) quod Willielmus Drake de Ivybridge in com. Devon. præd. arm. et Henricus Crymes de Buckland Monochor. in eodem com. gen. quarto die Julii anno primo suprad. vi et armis, &c. parcum Richardi Strode arm. in quo damæ adtunc et diu antea ac continue postea hucusque custodit. fuerunt scituat. et jacen. infra paroch. de Plymton beatæ Mariæ in com. præd. absque consensu præfat. Richardi Strode arm. adtunc existen. veri proprietor. (Anglice owner) ejudem parci aut alicujus al. person. adtunc habent. custod. (Anglice being intrusted with the custody) ejusdem parci illicite fregerunt et intraverunt et adtunc et ibid. unam damam fulvam (Anglice one fallow-deer) in eodem parco existen. depascent. cum quibusdam canibus venaticis suis illicite tertat. fuerunt et fugaverunt (Anglice coursed) contra formam statut. in hujusmodi casu edit. et provis. ideo considerat. est per nos præd. Richardum Hillersden et Thom. Hele justiciar. ut præfertur. existen. quod præfat. Willielmus Drake et Henricus Crymes deprædmissis imposit. super testimon. præd. convict. sunt. ad quod quilibet eorum præfat. Willielmi Drake et Henrici Crymes separaliter forisfaciat summum vigint. librar. pro offensa præd. unam medietat. præd. earund. summar. præfat. Johanni Sheffield existen. informatori et al. medietat. præfat. Ricardo Strode arm. existent. proprietar. (Anglice owner) damæ præd. solvend. secundum formam statut. præd. in cujus rei testimonium nos præfat. Richardus Hillersden et Thomas Hele huic recordo manus et sigilla nostra respective apposuimus die anno et loco prius suprascrip.

I moved to quash this conviction upon these exceptions :—

A. D. 1685.

First, Here two justices, upon a single oath, have convicted a man for breaking and entering a park, and coursing a deer, and imposed twenty pounds penalty for it: now there is no statute against breaking the park; the offence by 13 Car. 2. c. 10. is coursing, &c. and the penalty they have imposed is for the offence aforesaid, generally. But the Court said that the offence was hunting the deer.

A conviction on the 13 Car. 2. c. 10 for hunting deer, is good, although it also state that the defendant broke the park.

Secondly, They have not said that we did course without their consent, but only that we did break the park without their consent: now we might break the park without their consent, and have their consent to hunt notwithstanding: those words, "without consent" can never go to the whole, for it is not placed in the beginning nor in the end, but only in the first clause, describing the manner how, just before the adverb illicite; then comes the other clause, et unamdaman illicit fugaverunt. The Court said that the absque consensu went to the whole.

On a conviction stating that A. hunted deer, and broke the park, without consent of the owner, these words shall apply to the hunting as well as to the breaking.

Thirdly, Several penalties for one coursing, whereas the design of the Statute, by the dividend of the penalty, seems to be only to give a satisfaction for the deer spoiled. The Court said, that by the words of the statute every several person forfeit twenty pounds a piece.

By 13 Car. 2. c. 1. every person who is out when a deer is unlawfully hunted is liable to the penalty.

Fourthly, The statute requires the oath of one or more credible witnesses: now here is none but the informer, to whom the moiety of the penalty is given, whereas by law he cannot be a witness because a party; no more in this case than in any civil action, or in a qui tam upon any penal statute; and the owner of the park may be a witness as well as the informer; which will not be pretended: besides, the statute requires a credible witness, which surely he cannot be, that is to have a benefit by the conviction; that is a party interested. In the case of an information upon the Statute of Usury, the parties to the usurious contract shall not

If a statute direct a conviction on the oath of one credible witness, and give a moiety of the penalty to the informer, a conviction on the single testimony of the informer is bad.

A. D. 1685. be admitted witnesses, because they are testes in propria causa, (*a*) and so was it adjudged in Smith's Case, (*b*) and that case was much stronger, for there was another informer, and so he was not a party, but only was to have a benefit on such conviction, by the statute's avoiding his bond or security. Upon an indictment of perjury on the 5 Eliz. c. 9. he against whom the verdict is given shall not be a witness, because that afterwards he by action shall recover twenty pounds, and so it was adjudged in the case of one Bacon indicted for perjury (*c*) and the reason of it seems good, because he is a party concerned in interest in the effect of such proceeding. In our case it appears that he is the only witness, and, by the same record, it appears that he has twenty pounds for such testimony: besides, this statute gives no part of the penalty to the king, so that he is not concerned in interest; all is given to the informer and owner; and to allow them to be witnesses in this case, which is quasi their own, is somewhat hard, for they cannot be supposed indifferent, much less credible witnesses in that behalf. The Court stuck a little at this exception. Lord *Herbert*, Chief Justice, declared it unreasonable that it should be so, but here was a particular law which made the offence, and creates a particular form of proceeding.—*Wythens*, Justice. The two justices of the peace are sole judges of the credibility of the witnesses. And so *Wythens*, *Holloway*, and *Wright*, Justices, all seriatim and separatim, delivered their opinions that it was well enough (*d*). And so all these exceptions were disallowed.

(*a*) 12 Co. 68. Co. Lit. 6.
(*b*) Trinity Term, 8 Jac. 1.
(*c*) 2 Roll. Abr. 685.
(*d*) But it is now settled that the informer cannot be a witness, where he is entitled to any part of the penalty. See Rex v. Stone, Mich. Term, 2 Geo. 2. where it is said, that divers convictions had been quashed for the same reasons before. 2 Ld. Ray. 1545.

The King v. Lewellin. 1 *Shower, p.* 45. A. D. 1689.

A conviction on 33 Hen. 8. c. 6. must pursue the words of the statute. 3 Mod. 280. See the Cases and Boscawen's Treatise on Convictions, page 26.

Conviction for a gun contrary to 33 Hen. 8. c. 6. The conviction was for having a gun in his house. The statute is, use to keep in his or her house, and perhaps it might be lent him, the words of the statute ought to be pursued. Conviction quashed.

of Avery v. Hoole, Cowp. 825. Rex v. Hunt, Dougl. 683. notis;

The King v. Machin, Burchet and others. 1 *Shower, p.* 54.

The Chief Justice in Eyre cannot grant a warrant to apprehend a person for having killed deer and destroyed trees in one of the king's forests, on evidence that part of the property was found on his premises; but the offender may be apprehended if discovered in the mainour. Carth. 77. and Comb. 159. S. C.

The defendant, being taken by a messenger of the Lord Lovelace's, Chief Justice in Eyre, by his warrant to bring him before him where he should be, was charged upon oath for killing deer and cutting down young trees, some of the trees being found in one of their yards.—*Pemberton*, Sergeant, moved for their discharge, for that no warrant can be granted upon oath; but upon a presentment of the verderors an attachment lies.—*Manwood* saith, there must be a presentment before there is a warrant; here the warrant is to bring them before him wheresoever he be. By Charta de Foresta, 9 Hen. 3. c. 8. no man is to be taken for vert or venison, but upon indictment or presentment, (*a*) *Treby*, Attorney-general. Here they are taken in the mainour; the wood and timber which they cut is found in their house and yard. The preamble of the statute takes notice of persons kept in custody by foresters and regarders, but nothing is mentioned of the Chief Justice, but only of ministerial officers. (*b*) In case of asserting, the party is to be taken presently. The ordinary ministerial officers cannot do it; but the Chief Justice, who is a supreme judicial officer may. It is to

(*a*) See the Register, 80. F. N. B. 67. the Statutes of 1 Edw. 3. c. 8. 34 Edw. c. 1. 7 Rich. 2. c. 4. 4 Inst. 313. and 3 Bl. Com. 73.

(*b*) See Manwood on Forest Law, chap. 9. number 4; and Crompton's Jurisdiction of Courts, title "Justice in Eyre."

A. D. 1689 be compared to a constable and justice of peace at common law: a Chief Justice may take a recognizance or commit, even out of the forest, 1 Rolls Abr 534.—The Court. He may be apprehended if taken in the maniour; it is but an encroachment on the common law for justices of the peace to grant warrants before presentment or indictment (*c*); the court of attachments (*d*) is in being, though the swainmote is not, &c. (*e*) The words of the statute are general, "No man shall be taken or imprisoned;" the words are general, it is a general law. As to the mainour he must be taken in it: the Chief Justice cannot send to take in the mainour, for the mainour must be at the time when the thing was done or committed; for if the goods were found about him afterwards, that is not a taking in the mainour; for he might buy them, or another leave them there, &c. (*f*) The warrant ruled to be void, and they were all discharged per curiam.

(*c*) This is the notion of Sir Edward Coke, 4 Inst. 176. and the practice is said by Hawkins to be grounded rather upon connivance than the express rule of law. 2 Hawk. P. C. 132. But Sir Matthew Hale is of opinion, that a justice of peace has power to issue a warrant to apprehend a person accused of felony though not indicted, 2 Hale P. C. 108. and this practice seems now by long custom to be established, 4 Black. Com. 287.

(*d*) See 3 Bl. Com. 71.

(*e*) See 4 Inst. 289

(*f*) See 2 Hale P. C. 149. 3 Bl. Com. 71. 4 Bl. Com. 303. 2 Hawk. P. C. ch. 15. s. 41. Carth. 79.

A. D. 1692. *Carpenter v. Adams. Comberbach, p.* 183.

Game keeper takes away a gun. Trespass lies and the lord's warrant no justification.

Trespass for taking away a gun. Defendant justifies as game-keeper duly made within ten miles of London. —*Cur.* The plea is ill, not saying by whom he was made, nor that the plaintiff was an unqualified person by the Statute: and the defendant ought to have had a warrant from a justice of the peace: and an authority from the lord of the manor is not sufficient. Judgment pro Quer'.

The King v. Alsop. Holt, p. 405. A. D. 1692.

The defendant was convicted before the justices of peace in sessions, on an indictment brought against him for shooting in a gun with hail-shot, contrary to the Statute 2 and 3 E. 6. and upon that conviction was committed till he paid the forfeiture of 10*l.*; and afterwards he brought a Habeas Corpus, whereupon being in Court, several exceptions were taken to the indictment, and particularly, that the justices of peace have no jurisdiction to hear and determine this offence. —*Holt*, Chief Justice. The justices of peace, by the general words of their commission, have power to punish offences against any Statute made concerning the peace of the kingdom; but by this act on which this indictment is brought, the peace is in no wise concerned, because the offence thereby created is for want of due qualification of the person to shoot, which is not against the peace. And it cannot be an indictment upon the Statute of H. 8. because they do not shew the length of the gun, which by that law ought to be a yard long; and therefore the conclusion contra formam Statut' will not help it. But it was agreed, that the party might be indicted for this offence before the justices of Oyer and Terminer; but not before justices of peace for want of jurisdiction. The indictment was quashed.

4 Mod. 49, 51. 1 Show. 339.

2 and 3 Ed. 6. c. 14. 33 H. 8. c. 6.

The King v. Pullen. 1 *Salkeld, p.* 369.

Sir William Williams took exceptions to a conviction on 13 Car. 2. c. 10. wherein the memorandum was quod super 23 Septembris, Hall venit coram A, B, C, ribus justiciariiis pacis, et informavit, that the defendant, with greyhounds, chased in, &c., and that tunc Hall and Marshall made oath de veritate præmiss. et uper prædict. sacrament. Pullen was convicted, ideo onsideratum est quod forisfaciet 20*l.* one moiety to the nformer, the other to my lord Thanet, the proprietor of

Oath made de veritate præmissorum sufficient in convictions. 3 D. 305. p. 6. S. C. Comb. 213.

A. D. 1692. the park, secundum formam statut. It was agreed, that the whole need not be recited in the conviction: but if it be, and appear ill, it may vitiate the conviction. 2dly, They held, that saying they made oath de veritate præmiss, generally (*a*), without setting it forth specially, was well enough. 3dly, That the judgment for distribution was good enough, though the statute gives it after execution. 4thly, The 13 Car. 2. c. 10. is to be intended of clandestine hunting, &c. not where the party does it only to assert a right; but the Court could not take information of that by affidavits or otherwise, because it appeared not on the conviction. 5thly, That the time of the conviction, and also of the offence, must appear: the reason of which seems to be, because it must be on a prosecution within six months after the offence committed. Afterwards, viz. Hill. 3 W. and M.—*Shower* prayed an attachment upon the affirmance, but was denied it: yet the Court was of opinion, that they ought to execute their judgment of affirmance, as well in this case as of orders of sessions affirmed; but they thought the proper execution would be a levari, or fieri facias specially made out on the Statute of 13 Car. 2. c. 10. Nota, Pas. 4 W. and M. B. R., Rex & Reg. versus Rogers, the Court held they might award a fieri facias of the goods, and in default thereof a capias ad satisfaciendum against the person of the deer-stealer, as well as the justices; and a fieri facias was awarded in this latter case.

Palm. 44. 4 Co. 48. a. Execution may go on affirmance of convictions by levari, fieri fac. or capias ad satisfaciendum. Post. 374. 378. 379. pl. 24.

(*a*) It is now fully settled, that upon a conviction the evidence ought to be set out, that the Court may judge whether the justices have done right. Per Car. in K. v. Killett, Bur. 2063. So ruled, K. and Read, Doug. 485.

The King, v. ———. 1 *Shower, p.* 292.

Billingsgate's free-market. Indictment for forestalling, by buying at Billingsgate of fish. And held by *Holt*, Chief Justice, on trial at nisi prius, that the party was not guilty; for Billingsgate

was a market time out of mind, and so the party was acquitted: and by him, were it otherwise, all the fishmongers were liable to prosecutions. A. D. 1692.

Note.—This was at the instance of that company against a poor woman that cried fish.

(*a*) See the Statutes, 10 and 11 Will. 3. c. 24. and 9 Ann. c. 26.

Smith v. Kemp. 2 *Salkeld*, *p.* 637. A. D. 1693.

S. C. 4 Mod. 186. Skin. 342. Holt, 322.

Trespass lies for fishing in libera piscaria, and taking his fish.

Comber. 11. 433. 464. 4 Mod. 186. Carth. 285.

S. C. H. who hath free-warren, may bring trespass against any but the owner of the soil, for hunting there.

6 Mod. 183. 2 Keb. 178. 3 Mod. 97. 1 Mod. 105.

Trespass vi et armis, for taking fishes ex libera piscaria sua. Upon not guilty pleaded, and verdict for the plaintiff, it was moved in arrest of judgment by Carthew, that he that had libera piscaria, could not maintain trespass; and compared it to the case of a commoner who could not bring trespass for a trespass done in the common: that libera piscaria was not like libera warrena, for he did allow that he who had libera warrena might have trespass against any one but the owner of the soil, for hunting in his free-warren. 2 Ro. 111, 550. because libera warrena was a liberty to hunt in one's own or another's ground, exclusive of all others; and that this was granted by the king, who is master of all games: but libera piscaria was only a freedom of fishing with others, and the same with communis piscaria, and for this he cited 1 Inst. 122. and that such a grantee had only a liberty to take fish, and no property in them until taken; and so prayed that judgment might be arrested.—*Holt*, Chief Justice, cited and relied upon the Reg. 95. in point, where there is the same writ, and likewise in F. N. B. 15. G. H. 43 E. 3. 11, 6. and said there were three sorts of fisheries. 1. Separalis piscaria, and there, he who had the fishery was owner of the soil, and therefore it is a good plea in an action brought by him, that it is liberum tenementum of another. 2dly, Libera piscaria, which is where the right of fishing is granted to the grantee, and such a grantee hath a property in the fish, and may bring a

Vide Dav. Rep. 159. 1 Salk. 137.

H. having libera piscaria hath property in the fish,

A. D. 1698. possessory action for them, without making any title. 3dly, Communis piscaria, and this was to be resembled to the case of other common; and disallowed the authority of 1 Inst. 122 (*a*).—*Eyre*, Justice, said, that he took 1 Inst. 122. to be law, and that many judgments and precedents were founded upon that case, and that libera ex vi termini did imply common, which the Chief Justice and *Dolben* denied in defence of the Register. Et nota dict. fuit per Carthew in this case, that there were several writs there against law, particularly R. 105. trespass per baron and feme for assaulting the wife, and taking the goods of the husband.

and Co. Lit. 122, denied. Vide ante, 556. 11 Co. 17, &c. Cro. Car. 553, 554.

(*a*) The passage in 1 Inst. 122. relative to this subject is as follows: "A man may prescribe to have separalem piscariam in such a water, and the owner of the soil shall not fish there; but if he claim to have communium piscariæ, or liberam piscariam, the owner of the soil shall fish there." In 2 Bl. Com. 39. it is stated, agreeably to the opinion of Holt, that ownership of the soil is essential to a several fishery; but in Seymour v. Lord Courtenay, 5 Bur. 2814. the Court declined giving any opinion upon the point. In Kumersly v. Orpe, Doug. 56. it is mentioned as a point which seems still not quite settled. Mr. Hargrave, in a note to the above passage, in 1 Inst. observes, "We do not understand why a several fishery should not exist without the soil, as well as a several pasture." And, having examined the authorities in support of the contrary position, he says, "The arguments, as it should seem, are short of the purpose, for at the utmost they only prove, that a several fishery is presumed to comprehend the soil, till the contrary appears, which is perfectly consistent with Lord Coke's position, that they may be in different persons; and indeed appears the true doctrine upon the subject." In Seymour v. Lord Courtenay it was ruled, that a grant of fishery, with the exception of oysters, and a reservation of a right to take fish for the grantor's own title, constituted a several fishery, no other person having a co-extensive right with the grantee. It was held, that it could not be a free fishery because no person had a co-extensive right.

The King v. Rogers. Carthew, p. 231.

Upon a conviction for deer-stealing, the execution shall be by fieri facias. 3 Danv. 305. p. 6.

Conviction before a justice of peace upon the Statute against deer-stealing, removed into B. R. by certiorari, and confirmed by the Court; and now it was moved for execution against Rogers upon this conviction, and he had it by a fieri facias; and if the sheriff should return nulla bona, then a capias against the body; quod nota; and see the statute 13 Car. 2. cap. 10.

The King and Queen v. Bullock. 4 *Mod. p.* 147. A. D. 1693.

By the statute of 33 Hen. 8. c. 6. it is enacted, 'That none shall shoot, or keep in his house a cross-bow, hand-gun, &c. unless he hath lands to the value of one hundred pounds per annum, on pain to forfeit ten pounds for every offence; and that any person may carry the offender before the next justice of peace, who, upon due examination and proof, hath power to commit him till he pay the penalty: justices in sessions and stewards of leets have power to hear and determine these offences." The defendant not having the hundred pounds a year did shoot in a gun in the month of February, and, in the March following, was brought before a justice of the peace, and by him was convicted of this offence. And now a motion was made to quash this conviction, because it was before a single justice, who had not power by the statute to proceed in a summary way, unless the party is brought before him instantur upon view of the offence committed, which was not done in this case. And therefore the prosecutor was ordered to shew cause why it should not be quashed.

A single justice had not power to commit under 33 Hen. 8. c. 6. in a summary way, unless the offender was brought before him instanter upon view of the offence committed. 4 Com. Dig. "Justices of peace." (B. 43).

The King v. Litten. 1 *Shower, p.* 370.

Conviction by justices of Gloucestershire on the Statute 33 Hen. 8. c. 6. s. 16. for going with an hand-gun, not being qualified. Exception, that he was not taken upon the view, and so brought before the justices; for without that the justices had no authority to proceed in that summary way. Now here this conviction is a month after. Adjornatur.

Conviction on 33 Hen. 8. c. 6. for keeping a gun. 1 Show. 48. Plow. 17. 206. 2 Brownl. 266. 8 Co. 120. a. 6 Mod. 125. Cro. Eliz. 294.

821. Boscowen on Convictions, 29. 2 Term Rep. 18.

Badgerly v. Wood. 12 *Modern, p.* 47. A. D. 1694.

Prohibition to the spiritual court for tithe pigeons, on suggestion that they were spent in the house.—*Holt*, Chief Justice, doubted.

Tithe of pigeons spent in the house not due.

A. D. 1694. Deer-stealing.

The King & Queen v. Moseley & others. *Comb.* 233.

Three were convicted of deer-stealing upon the late statute, one upon his confession, and two upon evidence; and the judgment saith, that all three were convict. de separalibus offens. &c. by confession and testimony; and yet held well enough reddendo singula singulis; but for another exception (venatus in parculum,) the conviction was quashed.

A. D. 1696.

Gibbs v. Woolliscott. *3 Salk. Rep. p.* 290.

Skin. 677. Trespass for taking fish, and did not say suos, not good. Comb. 433. 464. Skin. 677. Holt, 323. S. C. Indictment 14. 3Mod.97. Postea, 4. Cumb. 11, 458, 465.

Trespass, &c. for that the defendant in seperali piscaria, & in libera piscaria sua apud D. piscavit, and did take and carry away five hundred salmons; upon not guilty pleaded, the defendant was found guilty as to the fishing in the free fishery of the plaintiff; and as to the several fishery, the jury found that the locus in quo, &c. was parcel of his manor.—Et per *Holt*, Chief Justice. A man may have a free fishery in his own soil, as for instance, he may have a river in his manor, and another may have a right of fishing there with him: but because the plaintiff in his declaration had not alledged, that the defendant took salmones suos (*a*), nor ibidem cepit, therefore the defendant had judgment.

(*a*) Vide 3 Lev. 237. Jan. 440. Cro. Car. 553. Com. Pleader, 3. M. 9.

Gipps v. Wollescot. *3 Salk. Rep. p.* 360.

Trespass for fishing and taking salmones, and did not say suos, not good. 3 Salk. 291. Skin. 677. Comb. 433. 458. 464. Carth. 285. 2 Salk. 637. 656.

Trespass against the defendant, for that he in separali piscaria & in libera piscaria sua apud H. piscavit, and did take and carry away five hundred salmons.—Per *Holt*, Chief Justice, a man may have a free fishery in his own soil; as for instance, suppose he hath a river within his manor, and another hath a right of fishing with him; but because it was not said salmones suos, nor ibidem cepit, the defendant had judgment. The same point was adjudged Pasch. 5 Will. 3. between Smith and Kemp.—4. Per curiam, in trespass the de-

A. D. 1696.

fendant may plead a title; but if an action of trespass be brought for the mesne profits, after a recovery in ejectment the defendant can neither plead a title or give it in evidence (*a*).—5. In trespass for fishing in his several fishery, and for taking twenty bushels of oysters, continuando piscationem prædict., from such a day to the time of the action brought. Upon not guilty pleaded, the plaintiff had a verdict, but could never get judgment upon the authority of Playter's Case, because the fishing mentioned under the continuando was uncertain, not expressing the quantity or quality of the fish; it is true, *Hale*, Chief Justice, said, that they were more strict formerly in the certainty of pleading than now, for now an indebitatus assumpsit for goods sold is held well, without any further certainty.—6. In trespass for breaking his close and eating his grass with cattle; the defendant pleaded, that at the time of the trespass, &c. he was possessed of all the corn growing on four acres of land parcel of the locus in quo, as of his proper goods, by reason whereof, at the time in which the trespass was supposed to be done, he entered with his cattle to mow, take, and carry away the corn, and in entering, the said cattle did the trespass, sparsim & raptim, and so justifies the trespass precisely; and upon demurrer this plea was adjudged ill, because the defendant did not set forth any title which he had to the corn, but only that he was possessed thereof, which is not sufficient without a title, because the property shall be intended to be in the owner of the soil.

Sid. 239.

1 Vent. 329. Trespass with a continuando, not good. 1 Lev. 210. 2 Jon. 109. 2 Lev. 230. Cro. Jac. 435, 665. 1 Show. 196.

2 Saund. 401. 1 Vent. 221. 2 Salk. 643. Where the defendant pleads a possession, but did not set forth a title, not good.

(*a*) Vide note to the title Ejectment, 1 Salk. 260.

The King v. Peckham. 9 *Will.* 3. *B. R. Carth.* 406.

Moved to quash a conviction for deer-stealing, made by a justice of peace upon the Statute 3 & 4 Will. the exceptions were; *ss.* That by the words of the statute, the prosecution ought to be within twelve months after

Where time in a statute is expressed by the year, it shall be computed by

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solar months; but where months are mentioned, it shall be lunar months. Comb. 439. S. C. 5 Mod. 321.

the fact; but by this conviction it appears that twelve lunar months were expired after the fact, and before any prosecution commenced. (2.) That Aylesworth, which was the place where the fact was laid to be done, is not expressed in the conviction to be a parish, which ought to appear to be a parish, because one part of the penalty is given to the poor of the parish where the fact was committed.—And now the record of the conviction being produced, it appeared that the prosecution was commenced before the end of twelve calendar months, but after the end of twelve lunar months; and thereupon a question did arise, in what manner the months mentioned in this statute should be computed, whether by the sun or the moon.—And this difference was taken, to which the Court agreed, *viz.* Where time mentioned in any statute is expressed by the year, half-year, or quarter of a year, it is always computed in law by solar months, *viz.* twelve calendar months for a year; but where months are mentioned in a statute, and not years, those are always computed by the moon, *viz.* four weeks to the month; therefore this statute appointing the prosecution to be within twelve months after the fact; and twelve lunar months being expired before any prosecution, for that reason the conviction was quashed.—No notice was taken of the second exception.

Hob. 179. 2 Inst. 320. 2 Rol. Ab. 522. 2 Cro. 167. 1 Sid. 186. 1 Keb. 695.

Burk v. Strood. 8 *Will.* 3. *B. R. Comberb.* 370.

In declaration for digging coney-burrows, &c. no need of shewing title. Whether the plaintiff or a stranger be owner of the soil.

In trespass. The plaintiff declared, that he was legitime possessionatus of a certain tenement, containing a fulling-mill, a close of pasture, and a piece of land called *D.* and that habuit & habere debuit common of pasture in a thousand acres in Mendam forest, for all beasts levant and couchant, tanquam ad tenementa prædict', that the defendant minding to disturb him of his common did dig and make coney-burrows there. The defendant demurred to the declaration, and judgment

was given for the plaintiff in C. B. and now upon a writ of error in this Court, it was resolved, 1. That there needs no title to be set forth in the declaration, it being grounded upon the possession, and the title but inducement to the action, which is founded upon a tort. —2. It need not be shewn, whether the defendant be owner of the soil, or a stranger; if in trespass for chasing or distraining cattle, the defendant sets forth his freehold or lease for years, and that he took them damage-fesant, then the plaintiff must prescribe for common.—3. It is not traversable, for all right of common must be proved upon not guilty, else the plaintiff cannot maintain his action.—The Court relied principally upon the Cases of St. John and Moody, Mich. 27 Car. 2. True, it was after a verdict, but *Hale* and the whole Court held it was a good declaration without the help of the verdict; and Blockley v. Slater, in C. B. Hill. 4 & 5 W. & M. Judicium affirmatur.

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Right of common not traversable. Quære.

Rex v. Yaites. 8 & 9 *W.* 3. 1 *Ld. Raym.* 151.

A. D. 1697.

Yaites was convicted of killing rabbits in a private warren, by inquisition taken before a justice of peace, and was fined twenty shillings a rabbit. And Mr. *Northey* moved to quash the inquisition, because the justices of peace have no authority to set a fine upon a man for such offence. For the statute 22 & 23 Car. 2. cap. 25. s. 4. gives treble costs and damages, but no fine. And the statute 4 & 5 Will. & Mar. cap. 23. extends only to game, which cannot be extended to rabbits kept in a private warren. And of this opinion was the whole Court, and therefore the inquisition was quashed.

Justices of peace cannot fine a man for killing rabbits in a private warren.

Bennett v. Talbois. 8 & 9 *W.* 3. 1 *Ld. Raym.* 119.

Trespass quare clausum fregit et herbam cum duabas vaccis conculcavit et consumpsit et in clauso venatus fuit, &c. existente inferiori artifice, viz. pannario, et alia enormia, &c. and concludes, contra formam statuti.

1 Salk. 212. 5 Mod. 307. Carth. 382. Statute of hunting. Holt. 661.

A. D. 1697. Upon not guilty pleaded, verdict for the plaintiff. And Mr. *Webb* moved in arrest of judgment, 1. That it is not said, that the defendant is not qualified by estate to hunt, without incurring the penalty of the act; for if he be, he might hunt by law. But to this it was resolved by the Court, that hunting is a trespass in alieno solo at common law, and actionable. Then the new statute 4 & 5 Will. & Mar. cap. 23. s. 10. only, as to this point of inferior tradesmen, repeals the statute of 22 & 23 Car. 2. cap. 9. which enacts, that the party shall recover no more costs than damages, when the jury give damages under forty shillings. But no act enables the party to hunt in another's ground; and therefore it is not material, how the person is qualified, in the case of an inferior tradesman, as to his estate. Then it was moved, that the plaintiff having concluded, contra formam statuti, this goes to the whole, and therefore it is ill; for the trespass is an offence at common law, and not against any statute. But to this *Holt*, Chief Justice, answered, that if an act of parliament increases the penalty, or deprives the party of the benefit of the common law, there he ought to conclude contra formam statuti. But if a man brings an action for such an offence, and for a thing that is an offence only at common law, and concludes contra formam statuti, though in grammar this goes to the whole, yet the Court will refer it only to the offence that is prohibited, &c. by the statute, and it shall be surplusage as to the offence at common law. And he resembled it to the Case of Page and Harwood, Allen, 43. So if a man brings an action for an offence contra formam statuti, where there is no statute, there the contra formam statuti shall be surplusage. And he

Comb. 420. 1 Comyns, 26. 12 Mod. 121. S. C.

Hunting in alieno solo is trespass at common law. Ruled acc. 2 Bla. Rep. 900. vide 1 Term Rep. 334.*

Contra formam statuti. See 2 Sid 52. 2 Inst. 200. 1 Cro. 233. 1 Vent. 105, 1. 2 Cro. 183. 4 Leon. 49. 3 Cro. 330.

* The Statute as to inferior tradesmen gives no new advantage, but is merely a partial repeal of the 22 and 23 of Car. 2. It extends to all inferior tradesmen, however they may be qualified in point of estate. S. C. cit. 3 Blac. Com. 215. Semb. cont. 2 Wils. 70.

cited a case in 1 Vent. 103. where A. brought an action for withdrawing his wife contra formam statuti, and because there was no statute, this was adjudged surplusage. But in this case the act of Will. & Mar. does not create a new penalty, but is a restitution of the common law; and therefore the party has no need to declare with contra formam statuti; and therefore it will be the better way hereafter to omit the contra formam statuti in such cases. And if the plaintiff declares that the defendant was an inferior tradesman, he shall have full costs. Then here, since he has declared with a contra formam statuti, where there was no need of it, without doubt it shall be surplusage. And therefore judgment was given for the plaintiff, nisi, &c. And in Easter Term it was absolutely given for the plaintiff. A. D. 1697. Year Book, 9 H. 6. p. 2. A. D. 1451.

Shadow v. Painter. 9 *Will.* 3. *Carthew*, 424. A. D. 1698.

Trespass quare warrenam & clausum ipsius (the plaintiff) fregit & intravit & herbas depast. &c. ac in eadem warrena & clauso cum canibus cuniculosis, Anglice, coney-dogs, venebatur, Anglice, did hunt, sine licentia & contra voluntatem ipsius (the plaintiff) eodem (the defendant) existen. artifice inferiori, viz. fabro ferrario & non existen. qualificat. ad servand. canes cuniculosos, & alia enormia, &c.—After a verdict for the plaintiff, and seven shillings damages, it was moved, that the plaintiff ought not to have full costs upon the new statute.—1. Because the matter is not laid contra formam statuti.—2. Because it is not laid, that the defendant hunted and killed any game, but only that he hunted generally.—Sed non allocatur; so the plaintiff had judgment, &c. Where the plaintiff had full costs. 2 Danv. 221, p. 18. Carth. 382. Salk. 505.

Courtney v. Connet. 9 *Will.* 3. *Carthew.* 436.

Trespass brought by Sir William Courtney against the defendant quare vi & armis clausum ipsius (the Trespass and case cannot be joined in

A. D. 1698. plaintiff) fregit & in solo effodit ac pisces suos cepit, necnon de eo quod (the defendant) quasdam exclusas & defensas cujusdam cataractæ fregit attollit & subtraxit per quod aqua ab eadem cataracta decurren' piscariam & stagnum ipsius Willielmi ibidem in tanto inundavit quod per cursum aquæ illius & inundationem prædict' non solum pisces in piscaria & stagno prædict' existen', videl't, (so many trouts, &c.) ad valentiam, &c. exiverunt verum etiam idem Willielmus & servientes sui a captione piscium in eisdem piscaria & stagno existen' impedit' & obstruct' fuerunt, &c.—Upon not guilty pleaded the plaintiff had a verdict, and it was moved in arrest of judgment, that this last part of the declaration was in trespass upon the case, and the first part was a mere trespass, which could not be joined in one action, because it was incompatible.—But after several debates the plaintiff had his judgment; for per curiam, this last matter was in its nature a trespass as well as the first.

the same action. 1 Danv. 8. p. 10. 1 Ld. Raym. 272. S. C. Vincent and Furzy, All. 9. Style, 3. 43, 44. 202. 1 Sid. 241, 245. 1 Keb. 852, 870, 871. 3 Keb. 59. 1 Vent. 365, 366. 3 Mod. 322.

Sutton v. Moody. 9 *Will.* 3. 1 *Ld. Raym.* 250.

Trespass quare clausum suum fregit et centum cuniculos suos adtunc et ibidem inventos venatus fuit occidit cepit et asportavit. Upon not guilty pleaded, verdict for the plaintiff and entire damages. *Gould*, sergeant, moved in arrest of judgment, that conies are feræ naturæ, and therefore there is no property in them in any; therefore since the plaintiff has laid property in them by the word [suos] it is ill, and no damages ought to have been given for them. But if the action had been for having hunted in warrena sua, and killed cuniculos suos there found, it had been good, for then he would have had a privileged property in them. The same law for fish taken in separali piscaria. Fitzh. N. Br. 87. 1 Cro. 553. Child v. Greenhill. March, 48. W. Jones, 440. But generally there is no property in things

Same case reported in 2 Salk. 555. 3 Salk. 290. Comb. 458. 1 Comyns, 34. 5 Mod. 375. 12 Mod. 144. Holt, 608. 14 Vin. 329. pl. 2. 18 Vin. 72, pl. 8. 2 Bac. 613. A man has a property in all animals which are feræ naturæ on his lands. See Cro. Jac. 195. Mar. 451. 1 Ventr. 122. acc. Godb.

which are feræ naturæ, and therefore trover does not lie for a hawk, without alledging that he was reclaimed; and in such an action it was adjudged against the plaintiff, though it was alledged in the declaration, that he was possessed of the hawk as of his proper goods. Dyer, 306. b. pl. 66. Sed non allocatur.—For per *Holt*, Chief Justice, a warren is a privilege, to use his land to such a purpose; and a man may have warren in his own land, and he may alien the land, and retain the privilege of warren. But this gives no greater property in the conies to the warrener, for the property arises to the party from the possession; and therefore if a man keeps conies in his close (as he may) he has a possessory property in them, so long as they abide there; but if they run into the land of his neighbour, he may kill them, for then he has the possessory property. If A. starts a hare in the ground of B. and hunts it, and there kills it, the property continues all the while in B. But if A. starts a hare in the ground of B. and hunts it into the ground of C. and kills it there, the property is in A. the hunter: but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C. But if A. starts a hare, &c. in a forest or warren of B. and hunts it into the ground of C. and there kills it, the property remains all the while in B. the proprietor of the warren, because the privilege continues. And these distinctions *Holt*, Chief Justice, took upon the authority of 12 Hen. 8. 9. And by the whole Court judgment was given for the plaintiff, because he had a property by the possession. And *Holt* cited 1 Ventr. 122. Pollexfen v. Ashford, as a case in point, where it is said, that it would be good upon a demurrer. See Reg. 93.b. Brownl. decl. 167. Rast. entr. 450. b. Theloal. dig. 196. 22 Hen. 6. 59. b. And *Holt* said, that the reason of the case in Dier, 306. b. was, that he admitted

A. D. 1698.

123. 11 Mod. 75. 7 Co. Case of Swans. Holt, 15, 16. 18. Cro. Car. 282. 6 Mod. 183. 7 Cok. 15. b. 2 Bla. Comm. 419. But this property ceases when they quit or are hunted off the land. Same cases, and see 2 Blac. Com. 419. The right of an owner of a forest or warren in the animals of the forest or warren continues after they are hunted out of the forest or warren, S. C. Holt. 3 Salk. and Bac. ubi supra. Dacc. Godb. 123. vide 2 Blac. Comm. 419. but not after they voluntarily quit it. S. C. 2 Bac. 613. vide 2 Blac. Com. 419.

A. D. 1698. himself out of possession, and therefore the action could not lie, unless the hawk was reclaimed.

Trover will not lie for things in which the whole property arises from the possession.

A. D. 1700. *The King v. Chandler.* 11 *Will.* 3. *Carth.* 501.

* 3 & 4 Will. cap. 10. Same case reported Carth. 508. & in Ld. Raym. 545. 581. 5 Mod. 446. Holt, 211. 12 Mod. 314. 3 Danv. 305.

Several exceptions taken to a conviction for deer-stealing. See also 1 Salk. 182. 369. 378. 383. Ant. 406. 1 Salk. 112. 385. 2 Salk. 681.

The defendant being convicted upon the * statute for killing deer in the king's chase called Enfield Chase, this conviction was removed by certiorari into B. R. and the following exceptions were taken to it. 1. For that the fact was not laid to be done upon any certain day, but generally that the defendant did between such days hunt and kill so many deer, whereas he ought to set forth the certain day. 2. It was laid to be done without the consent of the king proprietar' damarum, &c. but did not say tunc proprietar', so as to fix it at the time of killing the deer. 3. It was laid to be done without the authority of any person intrusted with the keeping the deer at the time when they were killed; whereas it is possible that the defendant might have authority from some person intrusted with the keeping, &c. at that time when the authority was given, but not intrusted, &c. at the time of the killing; and if so, the defendant is excusable, unless he had notice when the trust was determined. 4. It doth not appear, that any summons was awarded against the defendant, or that he was brought in by any lawful process. 5. The judgment is informal, being short of what is required by the statute; for here is no conditional judgment of setting the defendant on the pillory, *si.* &c. But as to this matter it was answered, that this conditional part ought not to be added, and for that the case in the † margin was cited, which was upon the Statute 23 Eliz. cap. 1. as a case in point. 6. It did not appear that the justices of peace coram quibus, &c. did give judgment upon evidence of witnesses, or upon confession of the party, for it is quia vi-

† 1 And. 138. Cuffe's Case.

sis, &c. omnibus præmissis, &c. constat to the justices, that the defendant est culpabilis; so for any thing appearing to the contrary, it may be partly upon evidence, and partly upon confession; which ought not to be. And in some short time afterwards another conviction was returned upon one Speed for killing one deer in the same chase, and the same counsel took exceptions to this conviction. 1. For that it was too generally laid in the circumstance of killing, for it was only said unam damam, Anglice a fallow deer, not saying whether buck, doe, or fawn, and it is quod illicite occidit, without shewing how, viz. whether by gun, arrow, net, &c. 2. It did not appear that the witness gave evidence face to face, so as the defendant might have an opportunity to cross-examine him. 3. The fact is laid to be done sine consensu proprietar', &c. without saying vel alicujus eorum. 4. It is said, that the defendant was convicted upon the evidence of such a one, credibilis testis, in ea parte, when it should be in hac parte. 5. The fact is not laid to be done contra pacem regis; which ought to be in all convictions upon forcible entries before justices of peace. Nota.—These convictions depended till Trinity Term, anno 12 Will. and then they were both affirmed. The objection which seemed to be of most weight, was the first, which was made in Chandler's Case, viz. That the fact was not laid to be done on any certain day, &c.; to which it was answered, that all informations in the Exchequer were in this form; and several precedents were cited in this point, which may be seen in the * margin. And it was held per curiam, that the manner of the killing need not be shewn specially, and that it was not necessary to lay it to be contra pacem; and that there needs no formal judgment upon this conviction, with an ideo consideratum est, but that it is sufficient to say, ideo convictus est, or ideo forisfaciet, &c. Nota.—These were the first cases of contro-

A. D 1700.

The King v. Speed. 1 Salk. 379.

4 Co. 41, 42.

2 Lev. 72.

* Rast. Ent. 410. Hern's Pleader, 507, 508. 549. Winch Ent. 541. 547. Thompson Ent. 92. Brown for-

A. D. 1700. versy upon any conviction on the last statute against deer-stealing. See the same case, Carth. 508.

multa placitandi, 50. 250, 251, 252. 260. Vidian Ent. 186. Coke Ent. 158.

The King v. Foster. 11 *Will.* 3. 1 *Ld. Raym.* 475.

Uncertain indictment. An indictment for ingrossing great numbers of dead wild fowl, with a design to make them dearer, quashed for uncertainty.* Rex v. Roberts, Show. 389.

Foster was indicted for that, that he had ingrossed magnos et excessivos numeros volucrum ferarum Anglice wild fowl mortuarum, with design to make them dearer, &c. Mr. *Robert Eyre* moved to quash it for the uncertainty, because they do not shew how much, &c. And he cited Cro. Car. 380. magnam quantitatem straminis et foeni, held ill. [See 2 Bulstr. 317. 1 Roll. Rep. 134.] And the Case of the King and Roberts since the Revolution, where a ferryman was indicted for extortion in taking four pence a score for sheep carried over, where he should but have taken two pence a score, &c. The defendant upon not guilty pleaded was convicted, but judgment was arrested, because the indictment did not shew, for how many score he had taken four pence. And the indictment against Foster was quashed.

A. D. 1701. *The King v. Speed.* 12 *Will.* 3. *Ld. Raym.* 583.

Same case reported Salk. 379. & 12 Mod. 328. Carth. 502. The last words extend to the whole sentence. Illicite occidit.

Exception was taken to this conviction for deer-stealing, that the facts are laid at several distinct days, and then at the end comes illicite occidit; and so it did not extend to them all. But per curiam it is one entire sentence, and then the illicite occidit will extend to every one of them, as well as if it had been repeated particularly. Afterwards another exception was taken, that illicite occidit is not sufficient, but they ought to say furtive, or cum animo furandi, or something resembling it, for every unlawful killing is not within the act.

* Vide 1 Roll. Reports, 134. 2 Bulst. 317. Bro. Indictment, pl. 6. 1 Lev. 203. 2 Hawk, c. 25. s. 76. 1 Edit. p. 2 8. Str. 497. Com. Indictment, G. 5. 2 Edit. vol 3. p. 505.

—But per *Holt*, Chief Justice, if there is a pretence of right, we ought to suppose, that the justice would do right, and acquit the defendant: because he is intrusted with the execution of the law. The intent of the act was, to prevent killing in a clandestine manner by stealth; but it is enough to lay the fact in the words of the act of parliament, and that ought to be admitted upon evidence. The title of the act is, against deer-stealers, but there is not any such word in the body of the act. And therefore if there was a dispute concerning the limits of a walk in a forest; and one claims as part of his walk, what is in fact part of the division of another, and accordingly kills deer there; the case is out of the intent of the act, but is plainly within the words. The intent of the act was, to punish rogues and vagabonds; and not to punish persons, who by mistake in the execution of their trusts exceed what the law warrants. If the keeper of a walk gives leave to a third person to kill a deer; though this licence does not give sufficient authority to the third person to kill it, yet it will not be an unlawful killing within the statute, because there is a colour of right. Another exception was, because it is not shewn, how he killed. Sed non allocatur, because the killing or not is the material part. —And *Holt*, Chief Justice, said in this case, that if a conviction was affirmed in this Court, this Court might award a levari facias; but if the defendant had no goods, he made a question, if they could imprison him. Both these convictions were affirmed. Ex relatione m'ri Jacob.

A. D. 1701.

If a man kills deer in pursuance of a supposed right that he hath, it is not within the act.

Coment.

Sir John Bridgman v. Jennings. 1 *Ld. Raym.* 734.

A. D. 1734.

Bul. Ni. Pri. 4 Edit. 248.

It was ruled by *Holt*, Chief Justice, at Summer Assizes at Warwick, 1699, that if A. be seised of the manors of B. and C. and during his seisin of both, he

A. D. 1701. causes a survey to be taken of the manor of B. and afterwards the manor of B. is conveyed to E. and after a long time there are disputes between the lords of the manors of B. and C. about their boundaries; this old survey may be given in evidence. And so it was done in this case. Contra, if the two manors had not been in the hands of the same person at the time of the survey taken.

A. D. 1702. *Anonymous.* 13 *Will.* 3. 12 *Mod. Rep. p.* 446.

Indictment at common law determines his election to prosecute for it on a statute.

It was moved to quash an indictment, which was for entering into a warren, and hunting and killing rabbits at night. The exception was, that by the Statute of 3 Jac. 1. c. 13. the offender forfeits treble damages and costs, half a year's imprisonment, and to find security for his good behaviour for seven years: and the indictment not concluding contra formam stat. the punishment of the statute cannot be inflicted; and if the defendant be fined upon this indictment, he may be, notwithstanding, again punished according to the statute, and so bis pro eodem delicto. Sed non allocatur; for if one has two remedies, the one by act of parliament, and the other by common law, and takes one of them, he thereby determines his election.

Vide 1 Inst. 145. *a.* 146. *a.*

The King v. Wharton and others. 13 *Will.* 3. 12 *Mod. Rep. p.* 510.

A river is the property of the owner of the lands adjoining to its banks. S.C. Holt, 499. Brid. 47.

Indictment was for riot against Policarpum Wharton, and others; but the cause of the riot being the right of a private river—*Holt*, Chief Justice. If a river run contiguously between the land of two persons, each of them is, of common right, owner of that part of the river which is next his land; and may let it to the other, or to a stranger.

A nuisance must exist before the

Secondly, If one see his neighbour erecting a thing which will be a nuisance, he cannot abate it till it be-

come an actual nuisance; so the maxim of præstat cautela quàm medela holds not in this case. A. D. 1701.

Thirdly, If one has a river, and for want of scouring it the neighbouring land is overflown, he is indictable for it. cause of it can be abated. Landholder indictable for not cleansing his ditches. 2Rol.Ab.137.

March, 26. 1 Vent. 90 183. 189. Cro. Car. 36. 2 Hawk. P. C. ch. 76. s. ch. 75. s. 11.

Fourthly, Unlawful assembly, riot, and rout, are three different offences. Riot, &c. 2 Hawk. P.C. ch. 65.

The Queen v. Moore. 1 *Ann.* 2 *Ld. Raym. Rep. p.* 791. A. D. 1702.

A conviction against the defendant for killing deer was removed into this court by certiorari, and was quashed, because it said only that he killed deer in quodam loco where they had been usually kept, and did not say enclosed. Vide 3 W. & M. c. 10. s. 2.

The Queen v. Whistler & al'. 1 *Ann.* 2 *Ld. Raym. Rep. p.* 842.

Rolfe, Stone, and Whistler, were convicted upon the 3 W. & M. c. 10. made against deer-stealers, viz. Rolfe and Stone, for the killing of five deer in the park of Sir Cecil Bishop, and Whistler, for that, that he fuit illicite et injuste auxilians et assistens Rolfe et Stone in occisione damarum illarum in incitando et persuadendo Rolfe et Stone to kill the said deer, et accomodando eisdem Rolfe et Stone equum et canem for the said purpose. This conviction was removed into the King's Bench by certiorari, and exceptions were taken to it by the counsel at the bar. And they were argued several times by Mr. *Montague*, &c. for the defendant, and by Mr. *Broderick*, Mr. *Cheshyre*, &c. for the queen. And the grand question was, whether the defendant Whistler was convict of any offence within the said act of parliament? And now this term the Judges pronounced their opinions in solemn arguments, viz. A man who persuades another to kill deer and lends him any thing for that purpose, is liable to the penalties of a statute made in terms against persons killing deer. Vide 4 Bl. Com. 34. Or persons aiding or assisting therein. Q.? S. C. but with some difference. Salk. 342. Holt, 225. At least in the last case if the pream-

A. D. 1702. *Powell*, *Powys*, and *Gould*, Justices, that the conviction was good, and ought to be affirmed; and *Holt*, Chief Justice, that it was bad, and ought to be quashed. —*Gould*, Justice, declared the reason of his opinion to be, 1. Because the defendant was included within the words of the act, aiding or assisting therein. 2. Because (by him) if the said words had been omitted; yet since in trespass all persons concerned are principals, the defendant should be included within the words, hunt and kill. And as to the first he said, that if the words of the act had been, aiding or assisting thereto, the defendant without doubt had been comprised within such words: then the word therein has the same import as thereto; and therefore that he was comprised within the words of the act. Besides which he said, that it is apparent, that such offenders as the defendant are within the intention of the act; and that appears from the preamble of the statute, which recites, that there were confederacies of such persons, and that they indemnified their associates; and then the statute enacts, that such persons offending in such manner, shall forfeit, &c. That is to say, that such persons, who are in confederacy and combination, and by such means aiding and assisting, &c. And as well he, as *Powys*, relied much upon the intent of the act.—And *Gould*, Justice, farther said, that he relied much upon the word such in the act, which couples the body of the act with the preamble, and makes it of equal extent. As upon the statute of 34 H. 8. c. 20. which disables donees in tail of the gift of the king from barring their issues by common recovery, the word such in the body of the act refers to the preamble, and includes all like cases, that is to say, which are such in the mischief and inconvenience. 2 Co. 14. b. Co. Lit. 373. So where the act of 23 H. 8. c. 1. takes away clergy from several offenders, and among them from burglars, robbers

ble of the statute takes notice of the inconvenience arising from combinations to kill them. S. C. but with some difference as to 2nd point. 7 Mod. 129. 11 Mod. 25.

upon the highway, and burners of houses; and then the 25 H. 8. c. 3. among other things takes away clergy from burglars, and robbers upon the highway, who do the act in one county and then fly into another county, and are there taken with the mainer and indicted; and then the statute 1 Ed. 6. c. 12. enumerating several offences, takes away clergy from them, but omits burners of houses, and the case of burglars and robbers in one county who fly into another: and by a general clause restores clergy to all other offences, &c. by which means clergy was restored in the two cases before; and then 5 & 6 Ed. 6. c. 10. reciting the several statutes before mentioned, and farther the inconvenience that clergy was restored in the case of burglary, &c. committed in one county where the offender fled and was convict in another county, which they could not have had, if the said act of 25 H. 8. c. 3. had been in force; it is therefore enacted, that the said act of 25 H. 8. touching the taking away of clergy from such offenders, touching such offences from thenceforth to be done, should stand in full force: these words, such offenders, and such offences, must be interpreted such in mischief and inconvenience, and will extend, to take away clergy from burners of houses, notwithstanding the particular recital of the said particular inconvenience, 11 Co. 33. Alexander Poulter's Case. And the Statute 5 & 6 Ed. 6. is a penal statute. And for the same reason here the abettors, procurers and aiders, though absent, being equally mischievous and of ill consequence with those who do the act, (a) they must be taken to be within the statute; especially since the word aid in its natural extent includes persons absent, who counsel, abet, &c. as 2 Inst. 192. explains it. 2. By him, if the said words had been omitted, the defendant had been within the words, hunt and kill; for in trespass, where all are principals, he who abets the doing of a fact, is the doer of the fact.

A. D. 1702.

(a) Sed Vide Fost. 361, 362. 4 Bl. Com. 34. Com. Dig. Justices, T. 1. 2d Ed. vol. 4. p. 25.

A. D. 1702. So in treason, 12 Co. 81. There is no difference between this case and felony, unless that in felony there may be accessories; for it is a rule, that when (*a*) a statute makes a fact felony, which was not so before, all the accessories before and after the fact are felons, 3 Inst. 59. and consequently in a law where they cannot be accessories, they must be principals. And he, as well as *Powys*, Justice, relied strongly upon 13 H. 7. 12, 13. where it is held, that the requesting of another to hunt is a hunting within 3 Ed. 1. c. 20. de malefactoribus in parcis; for the commanders shall be trespassers as well as the very trespassers; and yet it is a penal law, which shall not be taken by equity. 2 Inst. 199. And *Powys*, Justice, was of the same opinion with *Gould*, Justice, though upon the arguments he was strongly of another opinion. And he founded his opinion principally upon the intent of the act, as is said before in the argument of *Gould*, Justice.—*Powell*, Justice, differed from his brothers, in their construction made by the preamble. For (by him) being a penal law, it cannot be taken by equity. But he was of opinion that this conviction was good, because the defendant was comprehended within the very words of the act. For (by him) he is a hunter, killer, &c. in construction of law: and upon issue joined whether he was such or not, this evidence shewn in the conviction would maintain that he was. And (by him) the distinction made, where the penalty is annexed to the offence, and where to the person offending, which governs the case of Evans v. Finch, Cro. Car. 437. is nice; for whereas the Statute of Westm. 2. 13 Ed. 1. c. 34. enacts that if a man ravishes a woman, &c. he shall be a felon, nevertheless the persons aiding and abetting are ravishers; and yet there is nothing that can be a more personal act than that; the same law of a woman aiding, though she is incapable of doing the fact. So upon the act of 3 H. 7. c. 2. which makes the

(*a*) D. acc. ante 1 Ld. 416.

taking of a woman with force and marrying her, to be felony; though by the said act the accessories before the fact are made principals, yet persons aiding and abetting the ravisher after the fact are felons. So upon the Statute de malefactoribus in parcis, which is a penal law, and by which the penalty is annexed to the persons, as here, misdoers in parks and ponds, &c. The first case upon the said statute was 30 Ed. 1. 10. where it was adjudged that no trespass was within the said act, unless it was a trespass in hunting. The next case was the 5 H. 5. 1. where the breaking the park with intent to hunt was adjudged to be within the Statute. Then follows the 13 H. 7. 12, 13. where it is resolved, that the requesting of another to hunt is a hunting within the Statute. Also where the 30 H. 1. c. 12. makes such persons as enter the parks of the king or prince, with painted faces, or kill the deer there, felons; by a proviso in the same act it is enacted, that no person shall be adjudged accessories, but those who shall abet or procure such offence to be done: which was provided to exempt accessories after the fact, from being felons, as otherwise they would have been, notwithstanding that the person offending was made the felon. For it is always a rule, where a fact is made felony, that all (*a*) persons aiding and abetting to it shall be accessories, whether it be, that the offence is made felony, or the persons offending felons. And for the same reason the procurer in trespass shall be principal, since there is (*b*) no accessory in trespass. As to the objection, that the case of Finch v. Evans, Cro. Car. 473. and Page v. Harwood, Alleyn, 43, 44. makes this difference, where (*c*) clergy is taken away from the offence, and where from the person offending, and in this case the penalty is confined to the person actually doing the fact; he answered, that the said cases being cases of life, the Judges in favour of life construed the Statutes tenderly;

A. D. 1702.

Rat. tit. Forest.

(*a*) Acc. Fost. 125, 126. vide Fost. 361, 362.

(*b*) Acc. 4 Bl. Com. 36.

(*c*) Vide 1 Bl. Com. 88.

A. D. 1702. otherwise it seems absurd, to take away clergy from him who was upon the top of the ladder, and give it to him that was at the bottom; for if both had entered the room, and one of them had had the money in his custody at the request of the other, both of them would have been deprived of their clergy. And as to the case of Page v. Harwood, he said, that it seemed to him, that the offence consisted in the manner of doing it, because the Scots carried short daggers, and frequently upon differences arising at table, &c. stabbed others unprovided. But in the said case if A. had given the dagger to B. it seems, that B. would have been within the act. But (by him) the said resolutions being in cases of life, they will not be rules, to govern cases of smaller crimes. He concluded, that since in cases of all penal laws, as in those which make felonies, aiders and assisters are included, a fortiori it shall be accordingly in cases of trespass, where such persons are principals, and where the law not being so penal, there is not so much reason to make a strict construction.—But *Holt*, Chief Justice, delivered his opinion, that the conviction was not good within the statute, and therefore that it ought to be quashed. For (by him) this is a penal statute, and therefore ought not be construed by equity; but in making construction one must adhere to the letter, and one cannot extend it to facts equally criminal with those specified in the letter, if they are not contained in it. That this act is penal, appears by the penalty inflicted by it, by the subjecting of offenders to a new method of prosecution before a private jurisdiction contrary to the ancient liberties of Englishmen confirmed to them by Magna Charta, to be tried by their peers. Now this act does not inflict any penalty upon the confederates concerned in the offence. It is true, the preamble recites, that there were combinations, &c. but the enacting part of the statute does not inflict any

Penal statutes are to be construed according to the letter, and not according to equity. Acc. 1 Bl. Com. 88.

penalty, but has made the offence very penal to the actors, perhaps by reason of these confederacies. But since the act has not inflicted punishment upon them, we ought not. For one may imagine with great reason, that since the statute mentions confederates, and does not inflict punishment, that it did not intend that they should be punished, but only the actors. The words of the act are, aiders and assisters therein. Now that is the actors themselves; and if the act had intended confederates, it would have said thereto. A man who provides a horse to rob a park, is an aider of the fact, but not in the doing of the fact. In an indictment against the abettor they always say, that he was praesens confortans et auxilians, &c.; but in the indictment of the accessory they say, that he before the fact consuluit, mandavit, procuravit, et abbettavit; or that he after the fact recepit, auxiliavit, et confortavit: and by the first they mean aiders and assisters; therefore if a statute takes away clergy from aiders and abettors, yet accessories shall have their clergy. See this difference in this indictment of an abbettor and an accessory, Dier, 186.

A. D. 1702.

Indictment against abettors.

Indictment against accessories.

A statute which takes away clergy from aiders and abettors does not take it away from accessories.

Objection. That this offence is of an inferior nature, and therefore all are principals.

Answer. If the penalty had been inflicted upon all the trespassers, it had included all, because all are included within the denomination of trespassers. But here the penalty is inflicted upon persons by a particular description; and that is the true reason of the cases adjudged upon the Statute de malefactoribus in parcis, because the penalty is there inflicted upon the trespassers in parks, &c. which comprises all. But if the said Statute had imposed a penalty upon the hunters and chasers, &c. or any other offender by particular description; nobody had been within the said Statute, but those particularly described. And he relied strongly

A. D. 1702. upon the case of Evans and Finch, as strong in point, which he had seen upon the roll; and he put it at large as it is there, which agrees with the report of it in Cro. Car. 473. Evans went up a ladder to the window of Mr. Audley's chamber, and broke it, and took out 40*l.* Finch stood watching at the foot of the ladder, and assisted the doing of the felony; it was held, that Finch should have his clergy, notwithstanding the 39 E. c. 15. which takes away clergy from men convicted of the felonious taking of goods, &c. of the value of 5*s.* &c. out of any mansion house, &c. no person being in it. Now Evans and Finch were principals in the felony: but because clergy was not taken away from the offence, but from the person taking, &c. the statute was restrained to the letter, *viz.* to the persons actually taking. But if clergy had been taken away from the offence, as in case of robbery upon the highway: he who stood at the end of the way to watch, shall not have his clergy, no more than he who actually did the robbery.

Objection. If a fact, which at common law was but trespass, be made felony: or if felony be made treason; the procurers are felons or traitors: and by parity of reason they ought to be included within this law.

Answer. That in the cases cited the nature of the crime is altered, and it is made a crime of another species; and therefore the persons concerned in it cannot be trespassers or felons, but felons or traitors. He cited also the case of Page and Harwood, as a case founded upon the same reason as that of Finch and Evans, and corroborating it. Therefore the statute in the present case describing particularly what persons shall be punished, *viz.* courses, hunters, &c. it shall not be extended to any person, who cannot be comprised within the description, within which (as is aforesaid) the defendant is not. He was of opinion, that the convic-

tion ought to have been quashed. But by the opinion of the other three judges it was confirmed. A. D. 1702.

The Queen v. Smith. 7 Mod. Rep. p. 77.

In a conviction for stealing deer in the king's forest, it is not necessary to shew in what capacity the king is seised of the forest, for he is presumed to hold all his property in right of the crown. S. C. 1. Salk. 377. 7 Mod. 129. 1 Salk. 147. 182. 6 Mod. 83. Ld. Ray. 582. 1 Vern. 441.

Conviction on the Statute of Deer-stealing in the king's forest of Rockingham. The killing was in the time of King William the Third, and the conviction in the time of Queen Anne.—*Broderick* objected, that it was necessary to shew in what capacity the king was seised of the forest; for by the Statute, a third part of the penalty is given to the king. And therefore if the king was seised in his natural capacity, it ought to go to his executor; if in his politic capacity, it ought to go to the queen.—*Holt*, Chief Justice. The king can have nothing in his natural capacity, if it be not in right of his duchy *(a)*, or an estate-tail by the Statute of Donis *(b)*; for if the king purchase lands to him and his heirs, he shall have it in his politic capacity. And wherever the king is said generally to be seised, it shall be intended a seisin jure coronæ, and duchy-lands would now be in the queen, if they were not kept separate by act of parliament *(c)*. And if the queen should create a Duke of Lancaster at this day, he would not of consequence have the duchy-lands: and further, it is not material upon the conviction or judgment who shall have them.

In an information for hunting deer in a forest, it is sufficient to state generally that it was

Another exception was, that the conviction laid the killing to be in the forest of Rockingham, where deer were usually kept, and without the leave or consent of any intrusted with the keeping of the said forest or the said deer; and a forest has many walks and officers,

(*a*) Dyer, 209. pl. 22. Plowd. 212. 223.

(*b*) See Co. Lit. 15, 16.

(*c*) The lands and possessions of the Duchy of Lancaster are separated from the crown by a charter of Henry the Fourth, made by authority of parliament. 1 Keb. 643. 1. Raym. 90. Plowd. 214. Lutw. 1235. See also the Statutes 27 Hen. 8. c. 11. 27 Hen. 8. c. 16. 2 and 3 Philip and Mary, c. 20.

A. D. 1702. and it ought to exclude the leave and consent of any of them.—*Holt*, Chief Justice. It has been indeed held, that judges are not bound to take notice of the law of the forest ex officio; but I know no reason for that. But if you had leave of any particular keeper of any particular part of the forest, you could not be found guilty; for leave of a deputy is leave of a principal. And the conviction was affirmed.

without the consent of the keeper. Ld. Ray. 731

The Queen v. Ford. 2 Ld. Raymond, p. 768.

Where a statute imposes a pecuniary penalty upon conviction by a justice for an offence, and directs that it shall be levied by a warrant from such justice, if the conviction is removed into B. R. by certiorari, and there confirmed, a levari facias may be sued out of B. R. for the penalty.

Ford and the other defendants were convict of deer-stealing by justices of peace according to the late act of parliament, 3 W. and M. c. 10. And the convictions, being removed into the King's Bench by certiorari, were there confirmed. And after the confirmation, and before execution awarded, the person, who was as well the informer as the owner of the deer, died; and his wife, being his administratrix, suggested his death upon the roll, and that she was administratrix, and upon that sued a levari facias upon the said convictions confirmed as aforesaid, to levy the penalties; which were levied accordingly by the sheriff, and distributed as the statute directs. And now Mr. *King* moved, that this execution should be set aside as irregularly obtained. 1. Because a levari facias does not lie. 2. Because the execution ought not to have been sued by the administratrix without a scire facias, &c. But as to the first objection, the whole Court held, that a leverari facias well lay. But they held, that this execution was irregular; because in no case where the parties to the judgment are changed ought execution to be sued by any other without a scire facias. Whereupon restitution was granted of the money levied.

Execution cannot be upon a judgment sued out by one who was not party to it.

King v. Chandler. 1 *Ann.* 1 *Salkeld, p.* 378. A. D. 1702.

A conviction of deer-stealing on 3 and 4 W. and M. c. 10. was returned on a certiorari, and exceptions taken to it. And it was said by *Holt*, Chief Justice, that in these summary proceedings the right of an Englishman of being tried per pares suos was taken away; therefore the Court was to construe them strictly, so far as to see that the fact was an offence within the act, and that the justices proceeded accordingly (*a*). And these points were agreed; 1st, That the fact in the conviction need not be laid contra pacem, for mere form or formality is not required in these nor any other summary proceedings.—Et per *Northey*, Attorney-general, This is not the king's prosecution; he can have no fine; but the prosecution of the party, and this is the memorandum of what the justice had done in that matter.

Carth. 501. 508. 5 Mod. 440. Summary convictions must be construed strictly. Holt. 211. S. C. Cases B. R. 314. 3 D. 305. p. 6.

Not laid contra pacem. 4 Co. 41, 42.

2dly, That inter such a day and such a day he killed three deer, is good; for if a day certain were alledged, the informer is not tied up to that. Now in these cases he is confined to give evidence of a killing within these days, so that it is more certain and better for the defendant; and *Northey* cited Rast. 410. Hern. 549. Winch. 54. 547. Tho. 91, 92. Vid. 186. Co. Ent. 158, &c. Otherwise it is in informations at common law, because every distinct offence creates a new penalty, but in trespass a fact may be laid to be done diversis diebus et vicibus inter such a day and such a day; because it is not a new action, but an increase of damages, per *Gould*, quod *Holt*, C. J. concessit (*b*).

That between such a day and such a day he killed three deer, is well. Brown. Form. pl. 50, 250, 251, 252. 260. Vide Ent. 186. 2 Lev. 72.

3dly, That an unlawful killing is sufficient, and it

(*a*) Vide 2 T. R. pa. 18. Boscawen on Convictions, pa. 10. In the latter it is observed, that as to those parts of the record which are necessary to shew the jurisdiction of the magistrate, and give him cognizance of the complaint, the Courts are more strict in their rule of construction, and expect more precision in the statement, than as to the steps which follow when that essential point has been ascertained.

(*b*) R. acc. 10 Mod. 248.

A. D. 1702. need not set forth a hunting, nor how the deer was killed.

Post. 383. Considerat. est quod convictus est, is sufficient without forisfaciet.

4thly, That ideo consideratum est quod convictus est, without et quod forisfaciet, is sufficient (*a*); for the statute gives that in consequence, and the judicial part ends at the conviction; the rest is only consequence and execution.

Executor of the owner may sue execution.

5thly, That if the owner of the park die before execution, and the conviction is affirmed, here his executors shall have a levari facias [sed videtur, it must be upon affidavit, and then the matter suggested on the roll]. So may the churchwardens without suggestion or scire facias, and so may the king (*b*).

(*a*) R. Cont. Str. 2. 858. In the report of this part of the case in Ld. Raymond, the objection is said to be, that the judgment was quod forisfaciet; whereas it ought to have been ideo consideratum est quod, &c. In Carth. it is said to be, that there was no conditional judgment for setting on the pillory, *si*, &c. Vide Bur. 1163. Bosc. on Conv. 117.

(*b*) A particular form of a conviction for deer-stealing is prescribed by Stat. 16 G. 3. c. 30.

Sutton v. Moody. 3 Salkeld, p. 290.

3 Mod. 97. 5 Mod. 375. 2 Salk. 556. S. C. 1 Cro. 553. 545. Jones, 440. March, 48, 49. Of the different sorts of property. S. C. Ld. Ray. 250. Com. 34.

In this case it was held per *Holt*, Chief Justice, That if the plaintiff declared in trespass for breaking his close and killing centum cuniculos, [in the said close,] it is good without saying suos, for he has a property in them in respect of his close where they were killed; and of things of this nature there are three kinds of property, *viz.* absolute, qualified, and possessory. 1. A man hath an absolute property in feris natura sua mansuetis. 2. He hath a qualified property in feris mansuetis; and 3. He hath a possessory property in feris. Now whoever hath a possessory property, which is also a property ratione privilegii, there he may declare for the thing killed or taken, without saying that it was* suum; for he had a property by reason of his close in which it was, and may recover damages, which he cannot do unless the thing was

*7 Rep. 17. b. 6 Mod. 183.

suum. He farther held, that if a man finds a hare in his own land, and in hunting kills it on the land of another, it is the property of the hunter, and not of the person on whose ground it was killed; so if he starts a hare not on his own but on another man's land, and hunts it into the land of a third person, and there kills it, the property is still in the hunter; but if he starts a hare in a forest, and hunts and kills it in another man's land, the property is in the owner of the forest. A. D. 1702. Cumber. 464. 158. 3 Salk. 189. March, 48. 2 Salk. 556.

The Queen v. George. 2 Ann. 6 Mod. p. 40. A. D. 1703.

A conviction upon the Statute of 4 and 5 Will. and Mary, c. 11. was, that the party, "existens dissoluta persona," did hunt and kill so many hares. And it was quashed, because it was not said, that he was not qualified; for there are many dissolute persons worth two thousand pounds a year, and who are, by consequence, qualified to hunt, &c. (*a*). A conviction for killing game must state the negative qualification. 6 Mod. 57.

(*a*) See Rex v. Chip. 1 Stra. 711.; the Queen v. Mathews, 10 Mod. 27.; Rex v. Marriott, 1 Stra 66. Rex v. Hill, 2 Ld. Raym. 1415. Rex v. Jarvis, 1 Burr. 148. Bluet qui tam v. Needs, Comy. Rep. 525. Rex v. Wheatman, Dougl. 331. Rex v. Hall, 1 Term Rep. 320.

The Queen v. George. 2 Ann. 6 Mod. p. 57.

It was agreed, that the clause in the Statute of 4 and 5 Will. and Mary, c. 23. against destroying the game, *viz.* "That in case any hare, partridge, pheasant, pigeon, fish, fowl, or other game, shall, upon search or otherwise, be found, the offender shall be carried before some justice of peace of the same county, riding or division; and if such person do not give a good account how he came by such hare, partridge, pheasant, pigeon, fish, fowl, or other game, such as shall satisfy the said justice, or else shall not in some convenient time, to be set by the said justice, produce the party of whom he bought the same, or some other credible person, to depose upon oath such sale thereof, that then such person A person cannot be convicted without proof. S.C. 6 Mod. 40. 10 Mod. 26. Comy. 274. 522. 576. Ld. Ray. 1220. 1368. 1478. Stra. 496. 711. 1098.

A. D. 1703. not giving such good account, nor producing any such witness as aforesaid, shall be convicted by the said justice of such offence, and upon such conviction shall forfeit for every hare, &c. (*a*)" shall be understood, upon proof made, that it was found upon him; otherwise that there could be no conviction.

(*a*) See 9 Anne, c. 25. and 28 Geo. 2. c. 12.

Warren v. Matthews. 2 Ann. 6 Mod. p. 73.

Lawful fishing. S. C. 1 Salk. 357. 2 Salk. 637. 6 Com. Dig. 56.

Per Curiam. Every subject of common right may fish with lawful nets, &c. in a navigable river, as well as in the sea (*a*), and the king's grant cannot bar them thereof; but the crown only has a right to royal fish, and that the king only may grant.

(*a*) See Lord Fitwalter's Case, 1 Mod. 106. 2 Lev. 139. Carter v. Murcot, 4 Burr. 2163. Seymour v. Courtness, 5 Burr. 2814. Mayor of Lyner v. Turner, Cowp. 16. The Mayor of Oxford v. Richardson, 4 Term Rep. 437.—But see the judgment in this last case reversed, 2 H. Bl. Rep. 182.

Warren v. Matthews. 2 Ann. 1 Salkeld, p. 357.

Mod. Cases, 73. 105. S. C. Subject has a right to fish in all navigable rivers. Davies, 57. Plowd. 315. 7 Co. 2 Salk. 637.

One claimed solam piscariam in the river Ex, by a grant from the crown. Et per *Holt*, Chief Justice. The subject has a right to fish in all navigable rivers, as he has to fish in the sea; and a quo warranto ought to be brought to try the title of this grantee, and the validity of his grant (*a*).

(*a*) In navigable rivers the fishery is common; it is, prima facie, in the king, and is public. If any one claims it exclusively, he must shew a right. If he can shew a right by prescription, he may then exercise that right, though the presumption is against him unless he can prove such an exclusive right, Carter v. Mercot, 4 Bur. 2162. The same was also ruled in The Mayor, &c. of Oxford v. Richardson, 4 T. R. 437. Vide Davys, 55.

A. D. 1704. *The Queen v. Steer and others. 3 Ann. 6 Mod. p. 185.*

An indictment lies for fishing in another's private pond, and taking and carrying away so

Steer and others were indicted, for that at such a place in the county of Suffolk, vi et armis, in the defendant's pond illicitè et injustè piscerunt cum retibus, and so many carps, de bonis et catallis of the prosecutor, did take and carry away.—*Brotherick* moved to have

the indictment quashed, First. For the insensibility of the word piscerunt. A. D. 1704.

Secondly, For that these being fish in a pond, they could not be bona et catalla of any person. Per Curiam, The insensibility of the word "piscerunt" would not have vitiated, had the taking and carrying away of the fish been well laid. If a man has a close pond in which there are fish, he may call them pisces suos in an indictment, or he may not do it, at his pleasure, and either way is good; because being in a close pond, the property ratione loci in them cannot be lost, because they cannot swim away; but notwithstanding he cannot call them as bona et catalla, if they be not in trunks; and for that the indictment is bad, but however not fit to be quashed on motion, the offence of fishing in other men's ponds, and taking away their fish, being too great to receive so much countenance *(a)*.

many carps, the goods and chattels of the prosecutor. S. C. 3 Salk. 189. 291. 2 Keb. 178. 594. 2 Salk. 637. 3 Mod. 97. Ld. Ray. 239.

(a) See the Statute 5 Geo. 3. c. 14. 1 Hawk, P. C. Appendix the Third.

Anonymous. 6 *Mod. p.* 183.

Holt, Chief Justice. There needs no privilege to make a fish pond, as there needs in case of a warren.

Fish pond and warren.

Anonymous. 6 *Mod. Rep. p.* 223.

Per Curiam. First, no tithe is due for fish of common right, but it may be by custom (*a*).

Tithe fish. Cro. Car. 339. 1 Lev. 179. 1 Sid. 278. 1 Vent. 5. 5 Bac. Abr. Carth. 303.

Secondly, No wood is titheable of common right, but only by custom (*b*).

83. 3 Com. Dig. "Dismes." Wood is titheable by custom. 179. Skin. 51. 239. 341. 356. 560. 1 Keb. 454. 2 Keb. 2. 447.

(a) See Rex v. Carlyon, 3 Term Rep. 385.
(b) See Doctor and Student, Dial. 2. c. 55. 13 Co. 13.

Keble v. Hickringill. 5 *Ann.* 11 *Mod. Rep. p.* 74. A. D. 1706.

The question was, Whether an action upon the case for shooting at, disturbing, and scaring wild ducks from a decoy pond, without coming upon the plaintiff's soil,

A declaration in an action on the case, that the plain-

A. D. 1706. was such a damage as to support this action?—*Darnell*, Sergeant (*a*). Wild ducks are not such game as the law takes notice of; nor is a decoy a franchise, or comprehended within the word "royalty" (which the Court said signified a free-warren); but royalty had no such signification as is here claimed. Neither could a lord of a manor justify under a royalty to fish, hunt, or fowl in another man's soil (*b*). A decoy is not a privileged place: if it were, he must have it by grant or prescription (*c*). There is only a possessory property so as to kill them when they are there.—*Broderick*, Sergeant, contra. The declaration is, that the plaintiff was possessed of a piece of ground, whereupon a decoy, &c. and that the defendant malitiosè, intending to deprive him of the benefit came to the pond-head, and there disturbed, &c. and after verdict for the plaintiff, the Court will intend an entry upon his ground, though it is not laid in the declaration; and saying he came to the pond-head must be taken to be his ground. A man, while things that are feræ naturæ are upon his ground or soil, has such a possessory property, that if one kill the game (though he does not enter) he shall have an action of trespass for entering his ground (*d*), and shall recover damages for the thing killed (*e*). If a man put up a hare in my ground, and follow it, and kill it in the ground of J. S. yet I may take it. If a man has a market and right of toll, and another disturb people coming to the market, it is uncertain whether any goods may be sold, and consequently no ill, yet for the possibility of sale I may have an action. A man ought not so to use that which is his own as to hurt the property of another. Whenever there is malice and de-

tiff was possessed of a certain close, and a decoy therein; and that the defendant knowingly and with intention to injure him by preventing ducks from coming to the decoy, did, on divers times, maliciously shoot off guns, &c. is good, although it is not stated that the defendant entered the close. 11 Mod. 130. 3 Salk. 9. S. C. Holt, 14, 17. 19. See 11 East. 571.

(*a*) See the several objections taken in this case, S. C. Holt, 17.
(*b*) 1 Jones, 440. 1 Vent. 122.
(*c*) Fitz. N. B. 36, 37. 3 Lev. 227.
(*d*) Keilway, 203.
(*e*) 12 Hen. 8. pl. 10.

nage, a man may have an action on the case (*a*).— A. D. 1707.
Holt, Chief Justice, said, he was not satisfied with this ase.—It is agreed on all hands, that while the ducks re in the pond the plaintiff has a property, and the efendant was a wrong-doer to disturb him; but to in-end that he entered, or that he came upon his ground, would be too material to intend, it being trespass. But uppose the defendant had shot in his own ground, if e had had occasion to shoot, it would have been one hing; but to shoot on purpose to damage the plaintiff s another thing, and a wrong; he likened it to the case f a market and toll. It must be taken as it is found pon the record; but it is found to be done malitionè, nd so it appeared upon the evidence.—*Powell*, Justice. Every one has a property of things feræ naturæ ratione oli. A man may have a free warren in another man's oil, which he has ratione privilegii, and not soli, for ne man may have a privilege in another man's free-old. A man may have such a property in hares, as if e put it up in his ground, and course and kill it in nother man's ground, still the original property is in im, and the coursing is a continuance of this property. s this case is, the defendant has done an injury to ie plaintiff's property; for by frightening them away ou have destroyed his property.—*Powys* and *Gould*, ustices, to the same intent. A man may lawfully noot in his own ground, as to kill venison, &c. but not destroy maliciously the property of another. Ad-urned, and to stand in the paper until next Term (*b*).

(*a*) 3 Keb. 753. and 1 Vent. 348.
(*b*) In Trinity Term, 6 Anne, Holt, Chief Justice, delivered the opinion of e Court, S. C. 11 Mod. p. 130. and judgment was given for the plaintiff, S. C. olt, 20.

Keeble v. Hickeringill. 11 *Mod. Rep. p.* 130. A. D. 1708.
Holt, Chief Justice, delivered the judgment of the A decoy for

A. D. 1708. Court. The declaration is, that the plaintiff was lawfully possessed of a close of land, and a decoy therein; and that the defendant knowing it, and intending to deprive him of the benefit thereof, and to hinder the ducks from coming to the decoy, did, on divers times, shoot off and discharge guns, &c. maliciously; and a verdict is found for the plaintiff.

wild ducks is a kind of trade, and therefore an action on the case will lie for maliciously preventing the wild ducks from coming to the decoy. S.C. 11 Mod. 73 S. C. 3 Salk. 9. S. C. Holt, 14. 17. 19.

First, This decoy is a benefit to the plaintiff, and in nature of a trade; and there is the same reason that he should be repaired in damages for his decoy, as for any other trade. It is true, there may be a damnum sine injuria (*a*). If a man set up the same trade as mine in the same town, this is a damage to me, but it is sine injuriâ; for it is lawful for him to set up the same trade if he please (*b*). But this action is brought for disturbing the wild-ducks coming to his decoy, and so is in the nature of disturbing him from exercising his trade; and therefore he need not set forth how many ducks, which was the exception taken at the bar (*c*). Also this is not like Playter's Case (*d*), which was pisces suos cepit, and did not say how many, nor of what nature. For in this case it was impossible to say how many, because the action is brought for disturbing them coming only to his decoy.

Secondly, The Statute 25 Hen. 8. c. 17. enumerates what is wild-fowl; so that the law takes notice of wild-fowl, and shews what it is; and we must take notice of it too, or else how can we obey this law.

Thirdly, There is a difference between this case and that of franchises; for if I have a fair, market, ferry, or the like, granted to me, no man else shall use another to my damage; for these are of a public nature, and divers persons besides the grantee have an interest in them;

(*a*) Year Book, 11 Hen. 4. pl. 44 or 47.
(*b*) Year Book, 23. or 19 Edw. 3. fo. 18.
(*c*) See Cro. Jac. 123. 126. Owen, 109.
(*d*) 5 Co. 35.

and if I do not repair my ferry, &c. I am indictable; A. D. 1708.
and therefore no man shall (erect and) use another ferry, &c. to my damage. But any man may freely use a private franchise, as a park, warren, way, &c.

Fourthly, This case is not like Playter's Case, about taking fish out of a pond, &c.; for in that it was trespass to have damage for the thing taken; and therefore it was necessary to set out how many, and of what nature. But this action is trespass on the case, to have a recompence for a consequential damage or injury; and is for hindering me from exercising my private right; for those ducks might have come to my decoy to my benefit, which were here hindered, to my damage, &c. And according to this he cited a case in one of the Year Books, where an action was brought by the owner of a market, for hindering horses being brought to the market, and adjudged that it well lay, though it did not appear in certain that anybody would have brought them. And so where a person is hindered from going to a fair, market, &c. for it is injurious to hinder a man from going where he has a right to go (*a*). Judgment was given for the plaintiff (*b*).

(*a*) Quære, If not so where one is hindered from doing what he has a right to do, though no special damage.
(*b*) See S. C. Holt, 20.

Domina Regina v. Jennings. 1 *Salkeld, p.* 383. A. D. 1709.

On 3 and 4 W. and M. c. 10. Seller of deer's skin may be convicted. Rep. A. Q. 215. 227. S. C.

Sir James *Montague* moved to quash a conviction of deer-stealing on 3 and 4 W. and M. taken by a justice who entered into a glover's house, and, finding a deer-skin, asked him how he came by it; the glover said he bought it of J. S. who not giving a good account of himself, was convicted. And the Court held, that the justice might enter and convict the person that sold it; for the statute might be easily evaded, if the deer-stealer could discharge himself by a sale (*a*).

(*a*) The 5th section of Stat. 16 Geo. 3. c. 30. (which repeals the act of 4th W.

A. D. 1712.

The Queen v. Mathews. 10 *Mod. Rep. p.* 26.

A conviction on 5 Anne, c. 14. for killing game, must negatively state the qualifications mentioned in the 22 and 23 Car. 2. c. 25.

This was a conviction upon the Statute of 4 and 5 Anne, c. 14. for the preservation of the game. Two exceptions were taken: First, That the charge setting forth that the defendant Mathews, not being a person so and so qualified, and enumerating distinctly the several qualifications in the statute 22 and 23 Car. 2. c. 25. for the preservation of the game, omitted a new qualification allowed by this act, *viz.* that he was not a person authorized by a lord or lady of a manor to kill game for their use. The Court was of opinion, that had it been laid generally thus, "that he, not being a person qualified according to law," it had been enough; but the qualifications being distinctly and severally mentioned, the omission of one is fatal (*a*).

A person cannot be convicted on 4 and 5 Anne, c. 14. in more than one penalty on the same day.

Secondly, That the person was here charged with so many five pounds as he killed hares in the same day, whereas the offence in the Statute was the keeping of dogs, engines, &c. not killing hares. The Court was of opinion, that the offence for which the statute gave the forfeiture, was the keeping of dogs and engines, not killing the hares. If a man not qualified go a hunting and kill never so many hares upon the same day, he would forfeit but one five pounds, for it is but one offence. But if a man keep dogs, and go a hunting several days, and kill hares; if it had been thus laid, "that he, on such a day, kept dogs and killed, &c."

and M. and divers other acts concerning deer-stealing, and makes other provisions respecting that offence) expressly includes this case, and requires the skin to be traced from hand to hand to the first possessor.

(*a*) It is now fully established, that this general mode of stating the want of the qualifications mentioned in these statutes is not sufficient, Rex v. Marriott, 1 Stra. 66. Rex v. John Hill, Ld. Raym. 1415. and that in a conviction on these statutes the qualifications must be all negatively set out, Rex v. Jarvis, 1 Burr. 148. Rex v. Wheatman, Dougl. 331. But a general averment that the defendant was not qualified is sufficient in an action, Bluet Qui Tam v. Nead, Comy. Rep. 525. and in a conviction on statutes where the informer need not negative any of the exceptions, if he negative some of them only, yet the conviction is good, Rex v. Hall, 1 Term Rep. 320.

and then again such a day; by laying it thus severally, the offence is severed, and he shall forfeit five pounds for each offence (*b*). Adjournatur. A. D. 1712.

(*b*) See Rex v Gage, Stra. 516. Crepps v. Durden, Cowp. 640.

Domina Regina v Green. Gilbert, p. 231.

Commitment sur Game Act, for want of distress, till he should be discharged by due course of law, quashed. 5 An. c. 14. made perpetual by 9 An. c. 25.

Green was brought up by Habeas Corpus, and upon the return it appeared that he was convicted for coursing, not being qualified, contrary to the Game Act; that the justice issued his warrant for levying the fine, whereupon there was a return of no distress, and then he was committed to the House of Correction till he should be discharged by due course of law.—Sergeant *Commins* took an exception to the warrant, that it ought to have been for three months certain according to the Statute, and not till he should be discharged, &c. To which it was answered by Sergeant *Pratt*, and Mr. *Darnel*, that though the words of the Statute were so, yet this form was more proper in the warrant of that upon payment of the 5*l.* and on application to a justice of peace he might be discharged at any time within the three months, and if he did not, yet he must be discharged at the end of the three months; this form being made certain by reference to the direction of a general law. But the Court held that when an act of parliament says a man shall be imprisoned for a precise time, the commitment must be expressly for that time, that the gaoler may know how long exactly to keep him, and when it is expired he is forthwith to discharge him without applying to a justice of peace; and for this *Eyre*, Justice, cited cases. Rex v. Bracy, Mich. 8 W. 3. Doctor Greenvel's Case, Pas. 9 W. 3. Hollingshead's Case, Hill. 1 Annæ, they held also that the defendant could not have redeemed himself by paying the fine after committment, for that the nature of the punishment was then altered by express words of the statute, and the justices had executed their authority,

When a statute directs imprisonment for a certain time, the committment must express it.

After committment in default of distress, justices cannot discharge on paying the penalty.

A. D. 1712. and had no power to take the money. Upon this fault in the commitment the defendant was discharged. —*Parker*, Chief Justice, said, the merits of the case appeared to him very extraordinary, on granting the Habeas Corpus the defendant went a sporting with a gentleman of 300*l.* per annum, to take care of his dogs, that such persons ought to be taken as servants, and the justices should not commit in that case.

Regina v. Simpson. Gilbert, p. 282.

Conviction for deer-stealing on 3 and 4 W. & M. c. 10 Mod. 248 341. 378.

Mr. *Ager* moved to quash a conviction for deer-stealing on 3 and 4 W. and M. c. 10. and took the following exceptions.

1. That the information was too general, the fact being alledged on no particular day, but between the last of July and the sixth of August, during which time there might be two owners of the park, and consequently it would be impossible to know how to distribute the penalty, one third whereof is to the owner; besides it would put great difficulties on the defendant in making his defence, for if they may take a latitude for six days, they may as well do it for so many months, and so on; if the defendant has release, and that be dated within the period, how can he plead that, so as to appear to be after the offence; the like difficulty will be in case of a pardon.

2. The offence ought to be laid to be committed voluntariè, for there may be an unlawful killing, and yet if it be not voluntary nor maliciously not within the act.

3. This is a conviction upon default of appearance, and no process is issued against him, but only allowed that he had notice, the justices cannot convict on default, for no such power is given by the Statute, but the words imply the contrary, for the conviction is to be before a justice of the county where the fact is committed

r the party apprehended.—Mr. *Lutwyche*, contra: A. D. 1712.
As to the first, that was overruled in case of The King v. Chandler, Hil. 11 W. 3. it is agreeable to the proceedings in other cases. Informations in the Exchequer are so laid, and in trespass where a continuando is not proper the manner is, that between such a day and such a day he did the trespass, otherwise he could not give evidence of more than one day, and no inconvenience can arise from this, for in case of a release (which can only discharge the owner's part of the penalty, and not the crime) the justice will inquire of the time of the offence, and of the release; so in case of a pardon.

2. No occasion for voluntariè, it is laid in the words of the act illicitè, and concludes Contra formam Statuti, which could not be, if an involuntary killing.

3. Process not necessary, the Statute directs neither process nor notice; but the Court have required the latter as agreeable to natural justice, but it is alledged in this case, that if the appearance of the party be made necessary, the Statute will be wholly eluded, no power given by the Statute to issue a warrant.—*Parker*, Chief Justice. There is no reason for laying the charge further than the words of the act. If the killing were involuntary, that must come upon evidence by way of defence. The issue of a process seems to be within the same reason as notice, for that was only that the party might have an opportunity of being heard, and the words of this act, which direct the conviction to be before a justice of the county where he is apprehended, seem to import that they cannot proceed in his absence, but must bring him in.—*Eyre*, Justice. A power to issue a warrant will be incident to his jurisdiction. I do not see any thing in this act to convict upon default, and regularly that cannot be done in any case, for a witness cannot be examined before some issue be joined. There is a difference in these laws; the Act of Excise gives an

Quære, whether justices can convict in default of appearance, without express power given by the statute.

A. D. 1712. express power to proceed on appearance or contempt, which is an argument that where that is not done the justices cannot proceed in that manner.—*J. Powys*, Justice, semble accontre: Because the Statute intended a summary proceeding, which would be defeated by the construction. Adjournatur to next Trinity Term.

Domina Regina v. King & al'. 1 *Salkeld, p.* 182.

Respectively forfeit in statute, makes the forfeiture several upon each offender. Trem. 336, S. C.

A conviction for deer-stealing was removed against A. and B. wherein judgment was given that each should forfeit 30*l.* and it was objected that there ought to be but one 30*l.* forfeited: Sed non allocatur, for the words of the act are, that they shall respectively forfeit 30*l.* Cro. El. 480. Mo. 453. Noy, 60. And this penalty is not in nature of a satisfaction to the party grieved, but a punishment on the offender; and crimes are several, though debts be joint (*a*), which per *Powell* distinguishes this from the case of Partridge and Naylor in Cro. El. 480. and Noy, 62.

(*a*) The principle to be attended to in cases of this nature is stated as follows, by Lord Mansfield, in Rex v. Clarke, Cowp. 610. 612. "Where the offence is in its nature single, and cannot be severed, there the penalty shall be also single; because, though several persons may join in committing it, it still constitutes but one offence. But where the offence is in its nature several, and where every person concerned, may be separately guilty of it, there each offender is separately liable to the penalty, because the crime of each is distinct from the offence of the others, and each is punishable for his own crime." Vide Rex v. Bleasdale and another, 4 T. R. 809.

A. D. 1714. *Regina v. Cobbold. Gilbert, p.* 111.

Certiorari before justices of peace on the Game Act quashed, because the same person both the informer and witness. See 10 Mod. 193.

On a certiorari was returned, a conviction upon the Stat. 5 An. c. 14. for preservation of the game.—Mr. *Salkeld* took an exception to it, that the same person was both the informer and witness. The act runs, that if any person not qualified be convicted before a justice of the peace, on the oath of one or more credible witnesses, he shall forfeit 5*l.* one moiety to be paid to the informer, the other to the poor of the parish where the offence was committed. He insisted that the

informer could not be a witness, because he has an interest in the forfeiture, which after information cannot be pardoned. 3 Inst. 194. That at common law the evidence of a party interested should never be admitted; as on an information for usury, the party shall never be a witness, because it is to avoid his own contract; so in forgery, Regina v. Whiting, Mich. 10 W. 3. apud Guildhall; the case was, the mother gave her son a note for 5*l.* and he slid in a cypher, and made it 50*l.* and it was held the mother could not be a witness, because it was to defeat her own note. That this is a strong case, the trial here is in a summary way, not by jury, but only per testes to a judge, who is supposed wholly ignorant of the cause; ergo the witnesses should be less liable to exception, it is a trial in the forms of the civil law, where regularly two witnesses are required, Testimonium unius semiplena' facit probationem, and the father is not allowed to be witness for his son, and vice versâ. If this prevail, less credit will suffice for a witness in such trial, than in a trial by the common law. That the Statute not only requires a witness but a credible one, *i. e.* exceptione major, there are two exceptions to witnesses, such as entirely destroy his testimony and prevent his being a witness; Secondly, such as only diminish the credit of his testimony. The exceptions in this case would destroy his testimony, and prevent his being a witness; a fortiori he cannot be a credible witness. There are some cases where the informer shall be allowed a witness from the necessity of the thing, as in robbery or rape, and necessitas derimit onus probandi; but here it is not necessary, for he may set up any body to be an informer.

A. D. 1714.

Evidence at common law.

Trials in a summary way, derogation of common law.

Exceptions to witnesses.

Where a party interested may be a witness.

First objection, That this would discourage prosecutions, for a man will not be at the trouble to cause an information to be made, unless he may have part of the penalty. Answer, Men are presumed to love the

A. D. 1714. laws of their country, and the execution of them, it is pro bono publico, in which they are included.

3 Mod. 114. Second objection, The resolution of all the judges (except Saunders and Raymond) in Sergeants-Inn-Hall, upon 22 Car. 2. c. 1. against conventicles, that the informer is a lawful witness, notwithstanding part of the penalty to be given him by the act. 2 Jones, 233. To that he opposed the opinion of this court, in the Queen v. Shipley, Mich. 4 Annæ, n. 84. which was an information for keeping a still and distilling low wines, and it was quashed because the same person appeared to be both the informer and witness; to that he also opposed the common law of England, the laws of all nations, and the universal rule of justice which agree in this, that a man cannot be his own witness any more than his own judge. Upon this single exception the conviction was quashed.

Regina v. Allenby et al'. Gilbert, p. 120.

Conviction for deer-stealing quashed. Exception was taken to a conviction for deer-stealing, that it was only alledged, that the defendant killed it in a park, without adding where deers used to be kept. Quashed per Cur. for that reason.

Another quashed because the verbs in the pretertense informavit, &c.

The Queen v. Simpson. 10 Mod. Rep. p. 248.

In an information on a penal statute, it is sufficient to lay the offence as committed between such a time and such a time. This was a conviction of deer-stealing, before justices of the peace, upon the Statute 3 and 4 Will. and Mary, c. 10. (*a*). The exceptions taken were:

First, That no certain time was laid for the commission of the offence, but only that between such a time and such a time the defendant did steal unum cervum. In answer it was said, that it had been taken in the case of

(*a*) See 16 Geo. 3. c. 30. and 1 vol. Hawk, P. C. 7th edit. page 371 to 382

The King v. Chandler (*a*), and there over-ruled; and that it was the constant course of informations, in the court of exchequer, to set forth the time in the manner it is here done. A. D. 1714.

Secondly, That the conviction was behind his back, and without hearing him. Indeed he was summoned, but the act gives no manner of authority to proceed by way of summons. To this exception it was answered, that no way of proceeding whatsoever was directed by the act; that therefore the act being silent in this point, it must be left to the discretion of the justices; and that the way of proceeding by summons, was a way very consonant to reason and justice, inasmuch as it gives the defendant time and opportunity to make his defence; that the want of summons has been objected even in cases upon acts of parliament, that did not direct the proceedings to be by way of summons; as in the case of The Queen v. Peach (*b*). This was inforced by precedents, where, upon this very act of parliament the proceedings had been by summons. An information must shew that the party was summoned.

Thirdly, The summons is insufficient, supposing the justices could proceed in that way; for he is summoned to appear at Bolton, which must be understood to be a vill; and then how should the defendant know the house where the justices will be? To this exception taken against the summons itself, *viz.* the uncertainty of the time and place, when and where the defendant was summoned to appear, it was answered, that this objection supposes very great absurdities; as first, that the defendant cannot find the justice out; secondly, that the justice should come at an unreasonable hour, &c. A summons to appear at B. is sufficient.

Fourthly, It is to appear such a day, but not what time of the day. Perhaps the justices came at five The summons need not specify

(*a*) Ld Raym. 581. Salk. 378. See also 10 Mod. 248. and Boscawen on Convictions, 23, 24.

(*b*) See Rex v. Venables, Ld. Ray. 1405. Stra. 630. Rex v. Dyer, Salk. 181. Boscawen on Conv. 53 to 57.

A. D. 1714. the time of day.

o'clock in the morning, and the defendant not being there then, was convicted, though he came afterwards. To this exception it was answered, that the return, which must be taken for true, is an answer to the objection. For the return is, that the defendant licèt debitè summonitus ad hoc tempus et hunc locum, did not appear; so that at whatever time or place he was convicted, it must be now taken for true, that he was summoned to appear at that time and place.

What evidence is sufficient in a penal information.

Fifthly, Though in the information the offence may be said to be committed between such a time and such a time, yet the proof ought to be certain. Now the oath is no more, than that the defendant did, within such a time and such a time, steal unum cervum; so that the time is left as uncertain in the evidence as in the information; and then non constat that the evidence relates to the same deer; it should have been cervum in informatione prædict. mentionat. As to this objection, *viz.* want of certainty in the proof, it was answered, that it was next to impossible for the witness to be able to swear to the very day, and it is not to be intended that there were more deer stolen than one.—*Parker*, Chief Justice. It is more agreeable to the course of the common law that he should be summoned. There is nothing in the objection as to the evidence. Time must be taken to look into the precedents.—*Eyre*, Justice. As to the objection, that the time should have been set forth with more certainty, than that "between such a time and such a time, &c." that has been sufficiently settled in Chandler's Case (*a*) to be well enough. It is true, that the ad hoc tempus et hunc locum cannot be confined to a particular hour or place; but then it is not to be supposed but that a magistrate will administer justice with integrity; and it is the duty of the party summoned to attend his time and place. In informa-

Salk. 378.

(*a*) Id. Ray. 581

tions and indictments, no judgment can be given, unless the defendant appears. The defendant may indeed have judgment of outlawry passed against him; but that is for his contempt in not appearing. And if the judges of superior courts cannot proceed to judgment, unless the defendant appears; à fortiori justices of peace cannot. Some acts of parliament indeed give justices of peace a power of proceeding upon default: but exceptio probat regulam in rebus non exceptis. It seems to me, therefore, that he should have been apprehended by warrant.—*Powys*, junior. The design of the act of parliament is to give a summary way of proceeding. The defendant has been summoned, which surely is sufficient; for it would be absurd that he shall take advantage of his own contempt. Adjournatur. (*a*) A. D. 1714.

(*a*) This case was argued a second time in Michaelmas Term, 3 Geo. 1. 10 Mod. 341. and in Hilary Term following, Parker, Chief Justice, delivered the resolution of the Court, that the conviction was good. S. C. 10 Mod. 378.

The Queen v. Green. Fortescue, p. 274.

On return of Ha' Cor' on commitment upon act for killing hares, &c. upon conviction for hunting against that act. And the commitment appeared to be, until he should be discharged by due course of law, when by the act he ought to be committed for three months. Per C. J. *Parker*, and Cur', The commitment is wrong, let him be discharged, for he is now committed in execution, which is his punishment, and therefore ought to say how long, for he is not to pay the 5*l*. By due course of law, per Chief Justice, is when some officer has something further to do, but here it is a determined punishment for such a time. The Queen and Bracy was so, a commitment per commissioners of bankruptcy in this manner, when the act says he is to be committed, till he be examined; Dr. Groenvelt's Case, Pasch. 9 W. 3. was so, when commitment should have been till he pay his fine.

A commitment in execution upon a penal statute ought to say for how long.

A. D. 1714. Conviction for killing of rabbits.

The King v. Weston. 10 *Mod. Rep. p.* 279.

This was a conviction before justices, for the killing of conies in a warren enclosed. It was moved to quash this conviction, because the Statute 3 Jac. 1. c. 13. which relates to warrens enclosed, does not give this summary way of proceeding by conviction; and the Statute of 22 Car. 2. c. 25. which authorizes that way of proceeding, does not relate to warrens enclosed. The words of the Statute are to this purpose: "Forasmuch as conies are destroyed in warrens and grounds not enclosed, by reason the same is not prohibited by the statutes in that case provided, which extend only to grounds enclosed; therefore it is enacted, that whoever shall wrongfully enter into any warren or ground lawfully used for keeping of rabbits, though the same be not enclosed," &c.—The Court. The conviction is well warranted by 22 Car. 2. c. 25.; for the former was a partial, this a universal law; "into any warren." This satisfies the preamble. There is a vast difference between the words "not enclosed," and "though not enclosed;" the former are restrictive, but not the latter. Unless this act extends to warrens enclosed, they would be in a worse case than those not enclosed; because then an offence in the latter would be punishable by the short way of conviction before justices, but not the former.

A second objection was, that the summons is naught, for want of time given to the party to make his defence. But it was answered, that though the reason of summons and giving time is founded on natural justice, that a person may have an opportunity to make his defence, yet this conviction being founded upon confession of the party, the objection vanishes.

A. D. 1715. Difference in

The King v. Hawkins. *Fortescue, p.* 272.

This was on a return of a Ha' Cor', that the defen-

dant was committed for backbearing and carrying away a deer out of the forest; but it appeared to be after conviction. Objected to this return by *Pengelley*, that it does not say it was unlawfully taken away, because it might be with consent of the owner.—Chief Justice *Parker*. There is a difference in the return of a Ha' Cor', when it is before a conviction, and when after one; for where it is after a conviction, you need not be so particular; it ought to be alledged unlawfully if before a conviction, but in this case it may be in the conviction, so that will be well enough; now taking away a deer, though not killed, is within the act, and it cannot receive that construction of being taken in toils, for it is taking away quite; if it had said taken away, of which he was convicted, that might have done.—Per Chief Justice. Till process issues in order to distrain, he cannot have corporal punishment, i. e. without the return of the officer that he has not sufficient; as to the truth of facts, the return of the officer is the same as a special verdict; but if justice of peace will not believe it, upon information to the contrary, perhaps he may issue another warrant. And in order to come at these facts the Court ordered to bring up the defendant another day, and to return the conviction.

A. D. 1715. return of Ha' Cor' before and after conviction.

The Queen v. Simpson. 10 *Mod. p.* 341.

A. D. 1716.

This was a case that had long been depending; and the only question reserved to be spoken to was, Whether, upon the Statute of 3 and 4 Will. and Mary, c. 10. about deer-stealing, the justices of peace might convict the offender in his absence, upon his default to appear, being duly summoned? or, Whether the justices ought not, by issuing out their warrant for apprehending the party, to have compelled him to appear? —*Reeves*, for the latter side of the question. The statute being silent in this matter, the rules of common

If a defendant to an information on a penal statute be duly summoned, and neglect to appear, the justice may proceed to examine the case, and on proof of the offence may convict the offender.

A. D. 1716. law ought to be pursued as far as possibly they can. The judgment of the justices in this case is final; and there being no re-examination, natural justice requires that the justices should have the party brought before them, if possible. The Statute 33 Hen. 8. c. 20. was the first statute that gave leave for a man to be tried in his absence; but this statute was held to be by consequence and implication repealed by the Statute 1 and 2 Philip and Mary, c. 10. whereby all trials are left to the course of the common law (*a*). The consequence of a conviction upon this statute is very penal, *viz.* for want of sufficient distress a year's imprisonment and pillory. The subject-matter of this statute is a trespass at common-law, in which case a capias lies; therefore the justices here ought to have issued out their warrant, which is their capias. There are no words in this statute that give justices a power to convict without appearance; if they have it by implication, it is a greater power than is vested in the judges of Westminster-Hall. By this act of parliament a corporal punishment is to be inflicted; and according to the rules of common law, where the judgment is to be corporal punishment, judgment cannot be given in the absence of the offender. Even in attainders by parliament, execution cannot be awarded without the person be present, and asked, whether he has any thing to say why judgment should not, &c. But the very statute we are now upon plainly supposes the party should be present; for in the fourth section power is given, for fear the offender after conviction should escape, to the constable, other officer, or person prosecuting, to detain; which plainly imports his being present. It is observable that though by the statute the power of convicting is given to the justices of the county where the offence is committed; yet in

S. C. 1 Sess. Cas. 346.
S. C. Gilb. 282.
S. C. Stra. 46.
2 Ld. Ray. 1546. 1405.
Stra. 630.
Salk. 181.
2 Burr. 679.

(*a*) See Sir Wm. Staunford's Pleas of the Crown, 90. b.

case the party fly, and is apprehended in another county, then this power is devolved to the justices of that county where the party is taken, purely that the party may be present when convicted. As to the objection, that this construction will render conviction difficult, because a person may be summoned when he cannot be taken, the answer is, that if a summons in this case were sufficient, it must certainly be a personal summons; and he that can be personally summoned may be taken. —*Fortescue*, Solicitor-general, contra. By the statute which we are now upon, a new judge and a new way of proceeding is established. The very design of the statute is to prevent those delays that attend the forms of common law process. The proceedings in this case, where the statute is silent and does not interpose, are to be conducted by the rules of natural justice. He denied the rule laid down, that in summary proceedings the rules of the common law are to be observed; especially such rules as would directly overturn the nature of a summary process, and make it more prolix, &c. If this act of parliament had not intended to have pared away all the forms of common law, some of the proceedings by the common law would have been taken notice of by the act. It is very expressly set forth in the conviction that the party was duly summoned, and had notice to appear and shew cause why he should not be convicted. This is all that the rules of natural justice require; he might have appeared if he pleased; and surely he shall not take advantage of his own wrong, or else it will be in the power of any person at pleasure to avoid being convicted. As there are no words in the act of parliament that give a justice of peace power to convict in the absence of the offender, neither are there any words in the act that make his appearance necessary. If therefore the act of parliament is silent, and may be expounded either way, that A. D. 1716.

A. D. 1716. exposition ought certainly to prevail which will render the act most effectual. This is not to be considered as a criminal proceeding, but a civil one for a certain sum of money. By Bagge's Case (*a*), a person may be disfranchised, lose his freehold, if, when duly summoned, he will not appear; and the constant practice is to proceed to disfranchisement, in the absence, &c. if the party, being duly summoned, refuse to appear. Nay, this point was carried one step higher in Glide's Case (*b*); for it is there held, that if the party live out of the town he need not be summoned; and the reason is, because it was his duty to attend.

N. B. There were two convictions; and in one of them the party, before conviction, was heard by his attorney: therefore it was observed by the Solicitor-general, that though, strictly speaking, according to the forms of law, the offender could not make an attorney to appear for him, yet in this case, where the process is of a summary nature, and the rules of natural justice principally to be regarded, it is material, that any person was heard in his behalf; because then it cannot be said, that the person was condemned unheard. There is no case or authority quoted to shew that the justice has a power to apprehend. It is true, that where an act of parliament is plain, consequences are not to be regarded (*c*); for that would be to assume a legislative authority. But where an act of parliament is doubtful, there the consequences are to be considered; and care is to be taken, that such an interpretation be not put upon the act as will quite elude the force of it; and that will be the case here, if there can be no conviction but upon the appearance of the party. Whereas no inconvenience, no breach of any rules of natural justice attends

(*a*) 11 Co. 93.
(*b*) Trinity Term, 4 Will. and Mary.
(*c*) Hob. 97.

the other interpretation of the Statute 5 and 6 Will. and Mary, c. 22. about hackney-coaches, which is almost a parallel case; and the general practice of the commissioners there is, to convict without appearance upon a summons.—*Parker*, Chief Justice. A Court may, perhaps, in prudence, not care to give judgment in the absence of the party; but I see no reason but that it may be done, and I take it to have been done in Mawgridge's Case (*a*). Execution cannot indeed be awarded but in the presence of the party; but that depends upon this reason, that there may possibly be a mistake of the person; or some other reason may have happened, subsequent to the judgment, why execution should not be awarded, which is but reasonable the party should have an opportunity to insist upon. But here, had the party appeared, it is taken for granted that judgment might have been given in his absence. I am of opinion, that the summons must be personal; and therefore it is altogether as easy to take as to summon. The act plainly supposes, that the justices have a power to apprehend him; or else the clause would be a nugatory clause which supposes the offender may be apprehended. The expression of detaining does likewise suppose him present; otherwise the act should have run thus, "in case he be present." It is a known and general rule, that a statute ought to be interpreted by the rules of common law: and therefore since this is in nature of a trespass, for which a capias by common law lies; since the act plainly supposes justices of peace have a power to apprehend him, and that they will execute this power; and since it is as easy to apprehend as it is to summon, I am of opinion at present, that the justices ought to have the party before them.—*Pratt*, Justice. If a justice of peace has a power of issuing out his warrant for the bringing of the party before him, it A. D. 1716.

(*a*) 1 Kely. 119. 9 St. Tr. 61.

A. D. 1716. must be given him either by the express words of the statute, or as a power incident to the jurisdiction which the statute invests him with; if the latter way, I fear he must have the same power allowed him in all summary proceedings. If a summons be sufficient, I know not why the same summons should not do here as in other cases, *viz.* the leaving it, where the party cannot be found, at the usual place of his abode; and then a person may be summoned when he cannot be taken. Adjournatur (*a*).

(*a*) This case was argued again in the Hilary Term following, and the conviction adjudged to be good. 10 Mod. next Case, 378.

A. D. 1717.

Justices of peace may convict an offender in his absence, upon his default to appear, after being duly summoned. S. C. 10 Mod. 248. 341. S. C. 1 Sess. Cases, 346. S.C.Gilb.282.

The Queen v. Simpson. 10 *Mod.* 378.

Several convictions before justices of the peace, upon the Statute of 3 and 4 Will. and Mary, c. 10. for deer-stealing, being removed by certiorari into the King's Bench, exceptions were taken to them, which were argued several times (*a*).—*Parker*, Chief Justice, now delivered the resolution of the whole Court to the following effect:—The great objection against these convictions is, that the justices of the peace have no authority to proceed against the party, and convict him of the offence in his absence. As to this matter we are all of opinion, that the conviction is a good conviction, though taken in the absence of the party. And here it is to be observed, that the statute does not give the justices any particular direction, or prescribe any particular form to be observed in the convictions before them; all that the statute requires is, that this conviction be "by oath of one credible witness." So that the justices are not obliged to the observance of any rules, unless those of natural justice, which all men are bound to observe. One of those rules I readily own is, that the offender should be heard before he be

(*a*) See S. C. 10 Mod. 248. 341.

condemned. But this rule must admit of this limitation, *viz.* unless the party refuse to appear. For as it would be unjust not to require the justices to summon the party, and give him notice to appear and make his defence, so to require more from the justices would be to put it in the power of the offender to elude justice, and render his conviction impossible, by wilfully absenting himself. As to the manner how this notice is to be given, the act being altogether silent, we must recur to natural justice, which only requires the party should know when and where he is to appear and make his defence; and if he will then neither appear himself, nor trust his defence to any body else, it is highly reasonable he should be proceeded against; and not reap an advantage from a wilful and criminal absence. But it is objected, that statutes are best expounded by rules of common law; and that it is more agreeable to the forms observed by the common law, not to convict the party in his absence. I readily admit the rule laid down by them, that statutes are best expounded by rules of common law in like cases; and will therefore examine how the common law proceeds in criminal cases, where the party refuses to appear. And first, in case of outlawry for treason or felony, the law interprets his absence as a sufficient evidence of his guilt; and without requiring further proof or satisfaction, the law accounts him guilty of the fact; corruption of blood and forfeiture of estate ensue. In real actions, the second default is final and conclusive; and the Court, without regarding the merits of the cause, will give judgment that he shall lose his land. Outlawry in lesser crimes, or in personal actions, does not, as in the first case, in judgment of law, occasion the party to be looked upon as guilty of the fact; or, as in the second case, occasion a judgment for the thing in demand; but is yet in its consequences more penal and fatal than A. D. 1717.

A. D. 1717. if it did. For a restraint of the liberty of the party, if he can be found, the profits of the land while the outlawry remains in force, and all his goods and chattels forfeited to the king, together with an exclusion from the benefit and protection of the law, follow upon it. But it will be said, that for all these proceedings, the law has prescribed and directed all the forms and circumstances necessary to be observed in them. I proceed therefore to proceedings of a more summary nature, and consequently more resembling the case before us. The office of common-council-man is in law accounted a freehold; and yet nobody will say but a man may be amoved from it in his absence. To come now to proceedings in our own courts. Is it not our daily practice to set aside judgments irregularly obtained, grant attachments, &c. in the absence of the parties? Notice indeed must be given; but if the party will not appear, the Court proceeds without seeing or hearing. It is observable, that in some of the cases put before, the law proceeds to condemn the party not only in his absence, but for his absence, or, which is all one, esteems his absence so strong for an argument of guilt, that further proof is esteemed superfluous; whereas here the justices only proceed to examine, whether the charge be true; and do not condemn the offender, but on proof by oath. The case before us is like to the award of a writ of inquiry upon default, by common law. In many summary proceedings, there is no power given to oblige the party to appear; and that is the case here; there are no express words in the act by which it is given. By implication it cannot be given, unless it were of absolute necessity to the doing of justice; which I have shewn it is not. If this doctrine were true, it would follow that a member of a corporation might be arrested, in order to compel him to appear. By this rule the party must appear, though he think fit to con-

fess the fact and pay the penalty. If courts of law, that A. D. 1717.
are armed with a coercive power to bring the party in, do not, in the cases I have before mentioned, think themselves obliged, from the nature of the thing, to use this power; certainly we cannot expect it from justices of peace, who really are destitute of this power. Besides, I cannot see to what purpose this appearance before the justices is required. For when the party is before them, can they oblige him to make his defence? No, unless he pleases; and if he had pleased, he might have appeared without force; and yet the only end of his coming before them, is in order to make his defence. Lastly, the objection of not being forced to appear, cannot be made by the party; because if it be an error, it is one in favour of him who makes the objection; for this would be contrary to the general rule of law in other cases. But it is objected, that the summons is faulty; for it ought to appoint a particular hour of the day, place, &c. To this I answer, that as to this, the record stands thus; "licèt summonitus, &c. ad hoc tempus, et hunc locum, defaltam fecit." Now this in strictness does necessarily import, that the summons was to appear upon that very spot as to place, and that very instant as to time, where and when the justices were assembled; otherwise it could not have been a default. And what the justices have returned, must, by us, be accounted true in every particular. But it is objected, that these sorts of records are, as is very well known, not made up by the justices, according to the truth of the fact; but drawn up by advice of counsel, so as to obviate all the objections that may be made against them. To this it must be answered, that we ought to give credit to the justices of peace, in the execution of that power the law has intrusted them with; and that if the justices should make a false return, whereby the

A. D. 1717. party and justice are abused, they may be punished. The convictions were adjudged good (*a*).

(*a*) See Rex v. Kent, 2 Ld. Ray. 1546. Rex v. Venables, Stra. 650. 2 Ld. Ray. 1405. Reg. v. Dyer, Salk. 181. Reg. v. Green, 10 Mod. 213. Rex v. Manlinson, 2 Burr. 679.

A. D. 1718.

A conviction super præmissis for three penalties of five pounds each for killing three hares, where it appears that it was done at the same time, is bad, for the statute does not give five pounds for every hare, it being all but one offence. 2 Burn's Just. 335. Cowp. 610. 646. 10 Mod. 26. 3 Term Rep. 509.

Marriot v. Shaw and al.' Comyns, p. 274.

An action of replevin was brought by John and Richard Marriott, quare ceperunt bona et catalla ipsor' Richardi et Johannis (*viz.*) unum dolium piperis Jamaici, quatuor al' Dolia et un' al' parcell' sebi ad valent,' &c. apud Mansfield, &c. The defendant Rowland Shaw ut Constabularius de Mansfield in com' Nott' præd' bene advocat, and the other defendants ut servien' ipsius Rowlandi bene cogn', &c. quia dicit quod 17 Oct' 2 Geo. apud Mansfield præd. William Toone ven' coram J. Digby Ar' un' Just' Domini Regis ad pacem &c. in Com' præd' et dedit information' præfat' Just' quod præd' Richardus Marriott tallow-chandler infra tres menses ult' (*viz.*) 15 Oct' 2 Geo. adtunc existens persona per leges Angliæ minime qualificat' seu allocat' ad custodiend' aliquem canem leporar' ad occidend' et destruend feras, &c. apud E. in Com' præd' un' canem lepor' ad occidend' et destruend' feras, et apud C. in Com' præd' un' al' canem leporar' ad occidendum et destruendum feras illicite custodivit contr' form' stat' in hujusmodi casu edit' et provis', quodq' præd' Richardus Marriott apud E. et C. præd' eodem 15 die Oct' usus fuit canibus præd' et eum eisdem canibus un' leporem apud E. præd' et duos lepores apud C. præd' eodem 15 Oct' illicite interfecit contr' form' stat' in hujusmodi casu edit' et provis', et superinde postea, (*viz.*) præd' 17 Oct' 2 Geo. quidam C. Palmer et C. D. existen' testes credibiles, &c. deposuer' quod præd' R. Marriott 15 Oct' tunc existens persona minime qualificat' un' canem lepor' apud E. et un' al' canem lepor' apud C. illicite

custodivit contra form' stat', quodq' præd' R. Marriott dicto 15 die Oct' un' leporem apud E. præd' et duos lepores apud C. præd' illicite interfecit, &c. super quo præd' R. Marriott post summonitionem, &c. coram præfat' Just' comperuit, &c. et quia, &c. præfat' Just' constitit quod præfat' R. Marriott fuit culpabilis, &c. ideo cons' quod præd' R. Marriott convict' est de præmissis, &c. Record' cujus convictionis Dominus Rex in cur' Domini Regis coram ipso Rege nuper certis de causis mitti fecit, prout per record' ill', &c. A. D. 1718.

And the defendants ulterius dicunt quod 7 Jan. 2 Geo. præd' J. Digby tunc Just', &c. de et super præmiss' fecit quoddam Warrant' in script' Constabular' de Mansfield direct' ad levand' de bonis et catallis præd' R. Marriott 25*l.* per ipsum ut præfert' forisfact', virtute cujus warranti 9 Jan' 2 Geo. præd' Rolandus Shaw tunc Constabular' et præd Chr' et Jos' ad requisition' et in auxilium præd' Rowlandi ceper' bona et catalla, &c. ad levand' de medietate præd' R. Marriott 15*l.* de præd' 25*l.* pro tribus offensis, *viz.* interfectione trium leporum præd' de præd' quinque offensis unde præd' R. Marriott convict' fuit.

The plaintiff in bar to the avowry says, quod dicto 15 Oct' et ante et continue postea, &c. idem R. Marriott seisit' fuit, &c. ut de feodo in suo proprio jure de et in terris et tenementis in D. in com' præd' clari annui valoris 100*l.* per annum et ultra, ac eâ ratione tempore quo, &c. fuit persona per leges hujus Regni qualificat', &c. unde præd' J. Digby ante conviction' præd', &c. notitiam habuit, et quod convictio illa omnino vacua in lege exist', et hoc, &c. The defendants in reply dicunt quod præd' J. Digby non habuit notitiam, &c. To which it was demurred; because the defendants traverse a matter not alledged, not traverseable, not triable. The defendants join in demurrer. It was argued by Serjeant *Pengelly* for the plaintiff, and Ser-

A. D. 1718. jeant *Cheshyre* for the defendants. And it was insisted for the plaintiff, first, That the defendants ought to justify, and not avow, for Rowland Shaw took the goods but as an officer, and had not any interest in them. 1 Roll. 319. S. 4. 318. L. 45. 320. L. 5. 2 Cro. 436. To which it was answered, that in the cases cited the defendant could not avow or justify, at his election; but if he justifies, he shall not have a return; so resolved 3 Lev. 204. And this seems to be but form, which shall be aided upon a general demurrer; as if a defendant avows, where he ought to make conusance, it is but form. 2 Cro. 372. And here an avowry seems more proper; for the defendant ought to levy by distress and sale, and therefore ought to have a return, that he may sell. But as to this point the Court determined nothing.

Gilb. Replev. 143.

Secondly. That after the conviction shewn the defendant saith, Record' cujus conviction' Rex nuper cert' de causis coram just' de B. R. mitti fecit, whereby the conviction was suspended. To which it was answered, that the conviction was on the 19th of October, 2 Geo. the warrant upon it on the 7th of January, 2 Geo. and the declaration was Mich. 4 Geo. then when the defendant says, nuper mitti fecit, this refers to the time of the plea, not to the time between the warrant and conviction, which was two years before; but by the Stat. 5 Ann. c. 14. a certiorari does not restrain execution but where security is not given for payment of costs.

Thirdly, That the conviction does not shew five offences, yet the warrant says, that he shall pay 25*l.* and thereupon the defendant levied 15*l.* de præd' 25*l.* for three offences de offensis præd', (*viz.*) pro interfection' trium leporum præd'. To which it was answered, that the conviction says, that the justice was informed, and the witnesses deposed, quod R. Marriott 15 Oct. 2 Geo. apud E. custodivit canem leporar' ad occidend et

destruend' feras, quod custodivit apud C. un al' canem leporar' ad occidend', &c. contra form' stat', quod eodem 15 Oct' usus fuit canibus præd' et occidit un' leporem apud E. præd' et duos al' lepores apud C. contra form' stat. Then the warrant commands that they levy 25*l.* sic ut præfert' forisfact', and the defendant levied 15*l.* de præd' 25*l.* pro tribus offensis de offensis præd', (*viz.*) pro interfection' præd' trium leporum; and therefore the conviction has determined that there are five offences, and then the constable may levy for any of the offences; for though all the offences are comprised in the same conviction, it shall be a several conviction for every offence, and the officer may levy for a part, though not for all; and if the justice had determined these to be five several offences, though they are not, this is error in the justice; but the officer shall not be liable for the mistake of the justice, where the thing is within his jurisdiction. A. D. 1713.

Fourthly, That the plaintiffs are partners, and the defendant took the goods of both of them. To which it was answered, that he must take the goods of both to levy out the moiety of one partner. (*a*) 1 Salk. 392. 1 Show. 173. (*b*)

(*a*) Holt, 302. S. C.
(*b*) Holt, 613. S. C. Comb. 217. 2 Mod. 279. 2 Ld. Raym. 871. Cowp. 449. 1 Vez. 239. Dougl. 650. Comyns, 619.

As to the matter of law, it was insisted, that the plaintiff in bar to the avowry says, that he had 100*l.* per annum at the time of the offence and conviction, and for that reason was qualified, &c. of which the justice had notice; and if he was qualified, which is now admitted by the demurrer, then the justice had no jurisdiction of the subject matter; and if the thing be out of his jurisdiction, the officer shall not be excused, for all the proceeding is null and void, et coram non judice. To which it was answered, that here it was alledged in the conviction, quod fuit persona minime qualificat', and then if he does not alledge his qualification, and insist upon it at the time of the conviction, or

Infra, p. 524.

A. D. 1718. when he appeared before the justice, he shall not plead it afterwards to maintain his action against the constable. If a cause in an inferior Court be alledged infra jurisdiction' cur', though it be out of the jurisdiction, if the defendant does not plead to the jurisdiction he shall not have a prohibition afterwards. (*a*) 1 Vent. 88, (*b*) 181. 1 Sid. 461. Raym. 189. 2 Mod. 271. Nor can it be alledged for error in fact. 1 Vent. 236. Nor shall he have an action upon the Statute of (*c*) W. 1. 35. 2 Inst. 230. So trespass lies not against the officer, resolved 2 Mod. 58. (*d*) 196. though the plaintiff pleads, that the cause of action arose out of the jurisdiction. Lut. 935. (*e*) 1 Salk. 281. But an action for an escape lies against an officer, though he knew the matter arose out of the jurisdiction. 7 Ann. C. B. (*f*) Higgins versus Shief.

(*a*) 2 Keb. 673. 1 Mod. 63. S. C.

(*b*) 2 Keb. 353. 1 Mod. 81. S. C.

(*c*) St. Westm. 1. 3 Edw. 1. c. 35.

(*d*) Freem. 322. S. C.

(*e*) Holt. 186. Supra, p. 156.

(*f*) Supra, p. 153.

But afterwards the Court gave judgment for the plaintiff upon the third objection, without determining the matter of law; for that by the conviction there is not any number of offences alledged, for he is convicted super præmissis, and it appears it was only one offence; for the statute does not give 5*l*. for every hare, and all was done the same day, and so was only one offence.(1)

Infra, p. 524.

(1) Lord Mansfield in the case of Cripps v. Durden, Cowp. 646. declared that "killing a single hare was an offence; but that killing ten more in the same day would not multiply the offence, or the penalty imposed by the statute for killing one."—We find a similar decision upon this point in the case of the Queen v. Matthews, 10 Mod. 26. Where the Court were of opinion that the offence for which the statute gave the forfeiture, was the keeping of dogs and engines, and not the killing of hares. It was further determined, in this last cited case, that if a man kept dogs and went a hunting several days, and killed hares, if it was thus laid, that he such a day kept dogs and killed, and then again such a day, by laying it thus severally the offence would be severed, and he should forfeit 5l. for each offence.

The King v. Marriott. 1 *Strange*, *p.* 66.

Conviction for killing a hare, ill, quia the witness

Conviction before one justice for keeping a greyhound; reciting that one William Toune came and informed, that the defendant being a person not qualified

to keep a greyhound, did nevertheless keep one at A. and another at B. and with them killed one hare at A. and two at B. and that he being summoned did appear, and being asked what he had to say, offered nothing in excuse, and ideo the justice convicted him.—*Pengelly*, Serjeant, objected, that the justice should set out, why the defendant is not a qualified person, as that he is not the son of an esquire, nor has 100*l.* per annum in his own or his wife's right. For he ought not to make himself the sole judge, but give the reasons at large. West's Precedents tit. Indictments, § 129. page 145. § 270. page 147. § 298. 1 Saund. 262.—*Reeve*, contra. The conviction has pursued the words of the act, in saying the defendant, not being qualified, did so and so. The cases quoted are upon statutes where the express qualifications are mentioned, but the Statute 5 Annæ, c. 14. which gives the penalty, says only, "not being qualified according to the Statute 22 and 23 Car. 2. c. 25." The defendant at the time of the conviction might have shewn himself qualified, for there the affirmative lies. In orders of removal it is sufficient to say, the person came to settle contrary to law, without adding, "not having 10*l.* per annum, &c." though those are the qualifications required by the statute; and an order is as much a judgment as this, and the same reason holds in both cases.—*Pengelly*. The Statute 22 and 23 Car. 2. limits the qualifications, and 5 Annæ the penalty; and both these must be considered together as one act. For where one statute makes the offence, and another inflicts the punishment, it ought to appear that the proceedings tally with both. Plowd. 206. Allen, 49. Cro. Eliz. 750. This case differs from that of an order, for here an appeal lies, but here the judgment is final. The Chief Justice seemed to think the conviction would be good, having followed the words of 5 Annæ, and that if the defendant was qualified, he ought to have shewn

A. D. 1718.

swears generally a man is not qualified. 1 Sess. Ca. p. 125. No. 118. S.C.

Plow. 51. a. b.

A. D. 1713. it before the justice, being summoned for that purpose. But then *Eyre*, J. started an objection, that it was not the justice that had taken upon him to say the defendant was not qualified, but only the witness; for the conviction runs, that the witnesses being sworn, "dicunt et jurant et uterque eorum dicit et jurat quod defendens existens persona minimè qualificat' did such a day keep a greyhound;" so that it appears, the witness has given the law to the justice, and takes upon himself to judge of the defendant's qualifications, and the justice is only made use of as an instrument to reduce the opinion of the witness into a conviction. C. J. The existens, &c. should be the conclusion of the justice, and not the words of the witness; for he ought not to swear generally a man is not qualified, and such a general proof will not be good. This is only an invention, to support a conviction in general terms, which would be bad if the particular facts were alledged.—*Pratt*, J. Where the justices have a summary jurisdiction, and no appeal lies (as in this case) we must keep them up strictly to the law (1); and I should be glad if we could make them set out the whole particularly. But in this case I think it cannot be understood, that the existens, &c. are the words of the witness, for it cannot be supposed that he swore in Latin, and therefore I look upon this as the substance of the evidence reduced by the justice into form. If words are set out in English, we keep the witness strictly to the words; but where they are turned into Latin, if the substance and effect of them be proved, it is sufficient.—C. J. If ye render it in English, it is no more, than that the witnesses swore, that the defendant, not being a person qualified according to law, kept a greyhound. And we cannot intend, they swore negatively to every qualification (*a*). If any one of

(*a*) Vide note (3.)

(1) Rex v. Little, 1 Burr. 613. Rex v. Corden, 4 Burr. 2281. acc

the qualifications had been omitted, the conviction would have been bad; and so it will be, when all are omitted. This is a record that the witness upon oath deposed so and so. I have seen all the qualifications negatively recited in orders of removal.—*Eyre*, J. Rex v. Green(*b*) a conviction was quashed where the witness deposed de veritate præmissorum (2). In English depositions the effect is only set out, that the witness swore that, &c. And though this is only the recital made by the commissioners, yet it is as large as the words of the witness; and we must intend this evidence was taken in the same manner. The witness here cannot be indicted for perjury, in swearing the defendant was not the son of an esquire, &c. because he has conceived the matter in such general terms. I do not see how he could honestly swear this; for I believe had he been asked, as soon as he had said the defendant was not qualified, what the qualifications are, he could not have told you. Adjournatur. And afterwards *Pengelly* mentioned two cases, Regina v. Hayward, Pasch. 12 Annæ. There it was, "not being qualified, licensed, or authorized to keep any engine, &c." and it was quashed. The other was the same term, and quashed, because no qualifications were mentioned (3). And towards the end of the term this conviction was quashed; and the principal reason declared to be, because the witnesses had taken upon themselves to judge of the qualifications (4). A. D. 1718.

(*b*) 10 Mod. 212. Contra Salk. 369.

(2) According to the report in 10 Mod. the objection was, that the conviction only set forth, that the witness was sworn de veritate præmissorum, but did not state what it was that he did swear.

(3) So Rex v. Jervis, and the cases there cited. 1 Burr. 148. Rex v. Wheatman, Doug. 345. But the evidence need not negative every particular qualification. Rex v. Crowther, 1 Term Rep. 125.

(4) Vide Rex v. Baker, post. 316.

The Earl of Scarborough v. Hunter. Bunbury, p. 43. A. D. 1719.

Tithe of fish, how to be laid.

A Bill was preferred by the Earl of Scarborough for the tithe of fish due by custom, which custom was

A. D. 1719. laid for all fish taken at sea, and brought to land and sold within the parish of Hort, of which the plaintiff was the impropriate rector; secondly, for all fish sold at sea, and the vessel came back to the parish; thirdly, for fish taken by the inhabitants, and sold at another port. Although the plaintiff did not prove his custom as laid in the bill, yet by three barons against the chief baron, an issue was directed to try, whether there was such custom as laid in the bill, or whether any and what custom; though it was said, there never was any instance, where either the plaintiff or defendant insisted upon a modus, or custom, and did not prove it; that ever it went to a trial at law, it being essential to a modus or custom, that it be certain. It was also objected, that the custom was illegal as it was laid: for if it is a personal tithe, as insisted upon (and as the Court seemed to think) then a double tithe may be payable, not only in another port where the fish is sold, but also where the fisher inhabits; to which three Barons against the Lord Chief Baron said, it was a good custom; for one tithe may be paid by custom, and one of common right.

Issue directed to try a custom, though no proof of it made.

A double tithe may be payable, for one tithe may be due by custom and another of common right.

A. D. 1720. *The King v. Johnson.* 1 *Strange*, p. 261.

Appearance cures defects in summons.

Conviction on 5 Ann. c. 14. for keeping a gun not being qualified; and exception was taken by *Fazakerley*, that here was not a reasonable summons, for it was made on 5 October to appear the same day, which might be impossible upon account of distance, or the summons being served late, and his witnesses might not be got together on so short a warning: then it is to appear apud paroch' prædict', whereas there are two parishes mentioned before, so the man may have gone to one, whilst they were convicting him at the other. Salk. 181.—*Wearg*, contra. The defendant appeared at the time and made defence, so that cures all defects in the

summons. Et per Curiam, the answer is right (*a*). Then it was objected, that the statute requires the conviction to be by justices of the county where the offence was committed, and that does not appear in this case.—Et per Curiam, That must appear, or else they have no jurisdiction.—Et per *Wearg*. It does, for they distribute part of the penalty to the poor of the parish of Chelfield in com' Kanc', infra quam paroch' offensum præd' commissum fuit. And the justices are justices of the county of Kent, and style themselves so. Adjournatur. Mich. 7 Geo. it was quashed; for per Curiam, their jurisdiction must appear otherwise than out of their own mouth.

A. D. 1720.

It must appear in the conviction that the justices are of the county where the offence was committed.

(*a*) Rex v. Aiken, 3 Burr. 1785.

The King v. Whitlock. 1 *Strange, p.* 263.

The defendant being brought up from Newgate by habeas corpus, it appeared upon the return, that he was committed for deer-stealing, as the Statute 3 and 4 W. and M. c. 10. directs, not having sufficient distress; and that this was done by one justice under the Statute 5 Geo. and two exceptions were taken to the warrant.

Construction on Game Act of 5 Geo. c. 15. (*a*).

1. Because it does not appear, that conviction was ever confirmed in this court, or that the rule for confirmation was delivered to the justice, and the words of the statute are, "That after the confirmation of any conviction and delivering the rule to the justice, it shall and may be lawful, &c." Now this statute gives the justice a jurisdiction after confirmation, which he had not before; and therefore he ought to shew every thing requisite to found his jurisdiction, within the reason of the cases on the Statute Car. 2. where orders have been quashed for not appearing to be upon complaint of the churchwardens or overseers. So Hill. 4 Ann. Regina v. Hinam, a conviction on Car. 2. for selling coals by

13 and 14 Car. 2. c. 12.

16 and 17 Car. 2. c. 12.

(*a*) Vide 16 Geo. 3. c. 30.

A. D. 1720. scanty measure was quashed, because it did not appear to be done in the city of London. The word after makes what comes under it to be in the nature of a condition precedent, and imports something previous to found the jurisdiction.

2. The justice only says, that it has been certified to him by the constable, that there was no sufficient distress, whereas there ought to have been a warrant to levy, and a return to that, that there was no distress: it may be the constable only told him so.—Et per *Pratt*, C. J. and *Fortescue*, J. (absente *Powys*, J.) The warrant is well enough, for as to the last objection, the word certified imports it to be in a legal manner. Then as to the other objection, we take notice of our own records, and by them it appears the conviction is confirmed. The statute does not give the justice a new jurisdiction, but only revives his old one, which was suspended by the certiorari, and therefore this widely differs from the case of an order of removal, for there the overseers are in the nature of trustees for the parish, and unless they complain, it is to be supposed there is no grievance, and it is likewise to give an original jurisdiction.—*Eyre*, Justice, contra. The old jurisdiction was absolutely taken away by the certiorari, and this is a new jurisdiction given upon terms, for the prosecutor has his election to take a levari from us, or apply to the justice, and the delivering the rule is what makes his election. We never grant execution on affirmances in the Exchequer chamber, till a remittitur. The justice should likewise shew a return, that there was no distress, before he can order the man to be imprisoned; according to Dr. Bonham's Case and the Case Rex v. Chandler, Hil. 11 W. 3. in B. R. where it was held, that there must be a record of every fining and imprisonment. There being two judges to one, the defendant was remanded.

Where power is given to a justice to commit for want of a distress, if he state in his warrant that it is certified to him by the constable that there is none, it is enough.

Salk. 178.

The King v. Baker. 1 *Strange, p.* 315. A. D. 1720.

Conviction for taking pilchards, contra formam statuti, quashed, because the witness swears generally, that the defendant is guilty of the premisses, and that is taking upon himself to swear the law (*a*).

In convictions ill for the witness to swear the defendant is guilty generally. 11 Mod. 235.

(*a*) Rex v Marriot, 1 Stra. 66.

The King v. Tilly. 1 *Strange Rep. p.* 315.

A conviction for deer-stealing quashed, because the same person is both informer and witness, and is entitled to a part of the penalty (*a*).

Informer no witness, where entitled to part of the penalty.

(*a*) Regina v. Cobbold, Gilb. Rep. in B. R. 111. Regina v. Shipley, cited ib. 113. Regina v. Cooper, 12 Vin. 13 pl. 45. Rex v. Stone, 2 Ld. Raym 1545. Rex v. Piercy, Andr. 18. Rex v. Blaney, ib. 240. Rex v. Collins, cited Cas. temp. Hard. 176. S. P. Jennings v. Hankeys, 3 Mod. 114. Contra.

The King v. Filer. 1 *Strange Rep. p.* 495. A. D. 1722.

Conviction on 5 Ann. c. 14. for keeping a lurcher to destroy game, not being qualified. Mr. *Eyre* excepted, that it is not shewn he made use of the dog to destroy game; and it may be he only kept it for a gentleman who was qualified, it being common to put out dogs in that manner.—Sed per Curiam, the Statute 5 Ann. c. 14. is in the disjunctive keep or use, so that the bare keeping a lurcher is an offence, and so it was determined in the case of the King against King, Pas. 3 Geo. B. R. which was a conviction for keeping a gun, and it was not doubted by the Court, whether the keeping was not enough to be shewn, but the only question they made was, whether a gun was such an engine as is within that statute: and in that case a difference was taken as to keeping a dog which could only be to destroy the game, and the keeping a gun, which a man might do for the defence of his house (*b*). The conviction was confirmed.

Conviction for keeping only a lurcher good (*a*).

1 Sess. Ca. 93. pl. 88.

(*a*) Vide Rex v. Hartley, Cald. 175. Rex v. Thompson, 2 Term Rep. 21.
(*b*) Rex v. Gardner, 2 Stra. 1098. and the cases there cited.

A. D. 1723. *The King v. Gage.* 1 *Strange Rep.* 546.

5 Ann. c. 14.

Where justices have power to convict on oath of one witness, they may convict on the confession of the party (*b*). 8 Mod. 63. S. C.

The defendant was convicted on 5 Ann. c. 14. for using a greyhound in killing four hares, per quod he forfeited 20*l.* (*a*).—*Reeve* excepted to the conviction, that the act of parliament had only given the justices jurisdiction to convict upon the oath of one or more credible witnesses, whereas this was upon his own confession, which he insisted the justices had no power to take; and it follows in the act, that the person so convicted shall forfeit, which word so is relative to the former method by oath of one or more credible witnesses: and he put the common case upon the removal of a poor person, which must be upon complaint of the churchwardens or overseers, the justices having jurisdiction only in that manner.—Sed per Curiam, (præter *Eyre*, Justice.) The conviction must be confirmed. The intent of mentioning the oath of one witness was only to direct the justices, that they should not convict on less evidence: suppose the confession had not been before the justices, but before two witnesses who had sworn it; that would be convicting him on the oaths of witnesses, and yet the evidence would not be so strong as this. By the civil law confession is esteemed the highest evidence, and in some cases, though there are one hundred witnesses, the party is tortured to confess. Here the Justices had a better evidence than the oath of any single witness, and it is a monstrous thing to say that a better sort of evidence shall not do. *Eyre*, Justice, contra, thought there was no occasion to carry this act of parliament so far, the 22 and 23 Car. 2. c. 26. giving power to convict for this offence upon confession, with a different penalty, and that it ought to have been a con-

(*a*) Vide Rex v. Little, 1 Burr. 609. Rex v. Hall, 1 Term Rep. 320.

(*b*) It seems that the defendant cannot be convicted in more than one penalty of 5*l.* in one day, since whether he kills one or ten hares during that period, it constitutes but one offence. Per Lord Mansfield, Crepps v. Durden, Cowp. 646.

viction upon that statute. The conviction was con- A. D. 1723.
irmed.

The King v. Gage. 8 *Modern Rep. p.* 64.

A motion to quash a conviction for keeping a grey-hound and killing four hares, for which offence the for-feiture is five pounds, if not qualified. The case was thus: The statute 5 Anne, c. 14. directs, "That if any 'person or persons, not qualified by the laws of this 'realm so to do, shall keep or use any greyhounds, '&c. to kill and destroy the game, and shall be thereof 'convicted, upon the oath of one or two credible wit-'nesses, by the justice or justices of the peace where 'such offence is committed, the person or persons so 'convicted shall forfeit the sum of five pounds, &c." In this case the man was convicted upon his own confes-sion, which is not within the statute; and for that reason, if the justice of the peace had seen him kill a hare, he could not have convicted him upon his own view, be-cause that is not such a conviction as is required by this statute, and he has no power in this case but what he derives from thence; therefore the act ought to be pur-sued, and especially where it is penal, as this is, where the forfeiture relates to the conviction; and if it be not upon oath, as the statute directs, then nothing is for-feited. It is true, if this was an offence at common law, it might be otherwise; but being made so by a par-ticular act of parliament, the method of conviction must be pursued as therein directed. It is like the case of removing a poor man to the parish where he was last legally settled, which by the statute is directed to be 'at the complaint of the churchwardens and overseers 'of the poor, &c." Now if all the rest of the parish should complain to the Justices, and not those parish-officers, it would not justify their making an order to remove the man, because the statute directs, that it

If a statute authorize a justice of the peace to convict "on the oath of one or more credible witness or witnesses," and enact, that the person "so convicted" shall be liable to such a penalty, a conviction on the confession of the party is good. S. C. 1 Stra. 546. 1 Burr. 609. 1 Term. Rep. 320.

See 2 Bott's P. L. 763.

A. D. 1723. must be made upon the complaint of the churchwardens and overseers of the poor. On the other side it was argued, that the confession of the offender is within the intention, though not within the letter, of the statute; for the chief end of that law was to give jurisdiction to the justices of the peace. Now the confession of the party being the strongest evidence against himself, therefore where a justice of the peace convicts an offender upon a better and stronger evidence than required by the statute, such conviction must be good, especially since the act is only directory, viz. that the justices shall not convict without good evidence. As where a statute directs, that a promissory note shall be payable to one, or his order; yet where it was made payable to one alone, without the word "order," it was held good, and within the statute. By the opinion of three Judges, this is a good conviction, for it is plain that the defendant was guilty of the offence; and if his confession had been made any where else, and not to the justice of the peace, yet if such confession had been proved, the justice might have convicted the offender; now here was a stronger evidence of his guilt than required by the statute; and therefore his conviction shall be good. If a man come into court, and confess himself guilty of high treason, such confession is good against him, and even in penal laws, the intention of the legislators is the best method to construe the law: now the intention of this statute seems to be not in what method or manner of proof the offender shall be convicted, but that the conviction should be on good proof, and a better cannot be had than the confession of the party against himself. The legislators could not foresee all the cases which might happen upon this law; therefore the conviction on oath was only directory to the justices of the peace; and by the civil law, no man is to suffer without confessing the crime of which he is accused. So this con-

viction was affirmed. *Eyre*, Justice. In the case of the King *v.* Simpson (*a*), for deer-stealing, upon 2 and 3 Will. and Mary, c. 10. where the defendant made default, and did not appear, he was convicted, and it was adjudged a good conviction, though that act did not expressly give authority to convict upon default. By the Statute 22 Car. 2. c. 25. he who keeps a greyhound, not being qualified, is punishable; and the conviction is to be by oath or confession of the party; which statute is confirmed by this of 5 Anne, c. 14.; so that these laws shall both stand together. Now the statute of 5 Anne, c. 14. having directed that the conviction shall be upon oath, whereas the other is by confession or oath, it seems that the legislature by this last act intended that the manner of conviction by confession should still be on the Statute 22 Car. 2. c. 25. and not on the Statute 5 Anne, c. 14.; for by that statute the conviction is to be upon oath; and if a man might be convicted on this last act on his own confession, there had been no occasion to confirm the Statute 22 Car. 2. c. 25.—Per Curiam, (*Eyre*, Justice, dubitant.) Let the conviction be confirmed. A. D. 1723.

(*a*) Gilb. Cases 282. 10 Mod. 248. 341. 378. Sess. Cases, 346. 1 Stra. 44.

Shipton v. Hopton. 8 *Modern Rep. p.* 238. A. D. 1724.

Debt for keeping an engine to destroy the game.

This was an action of debt, qui tam, &c. (*a*) brought by a common informer, on the Statute 5 Ann, c. 14. for fifteen pounds, wherein the plaintiff declared on two several counts, one for ten pounds for killing two partridges, the other for five pounds for keeping an engine to destroy game, not being qualified, &c. virtute statutorum hujus regni; upon nil debet pleaded, the plaintiff had a verdict for five pounds only. It was now moved, that he might enter the verdict on either of the counts,

(*a*) This action is given by the Statute 8 Geo. 1. c. 19. by which it is enacted, that where an offence shall be committed against any law for preserving the game, and the offender liable to pay a pecuniary penalty, upon a conviction before a justice, any person may sue for it by an action of debt." See now 26 Geo. 2. c. 2. 2 Geo. 3. c. 19.

A. D. 1724. because the defendant intended to move in arrest of judgment; for though he might not be qualified by the statutes of this land to keep a gun, yet if he be otherwise qualified by law, he is not subject to this penalty. Now he may be qualified by law, as being huntsman to a nobleman, who, in coming up to the parliament, may kill a deer in any of the king's forests; and this he may do by the forest-law, which is part of the law of this realm. And for this reason the plaintiff was ordered to enter his judgment.

The King v. Burchet and his Attorney, and the Town-Clerk of Guildford. 8 *Mod. Rep. p.* 209.

An attachment lies for replevying goods distrained under a conviction on a penal statute. S. C. 1 Stra. 567.

Burchet was convicted by a justice of peace for keepings dogs, nets, and ferrets, to catch conies, not being qualified, &c. and by a warrant from the said justice, his goods were distrained for the forfeiture; and whilst they were in the possession of the constable, and before they were sold, the town-clerk granted a replevin to take them from the constable. It was moved, to set the replevin aside, because goods thus taken by distress on such convictions are irrepleviable, and for an attachment against the town-clerk. The Court would not set aside the replevin, but made a rule to shew cause why an attachment should not go (*a*). The rule was afterwards discharged by *Eyre*, Justice, then alone upon the bench (*b*).

(*a*) Vide 8 Mod. 96.

(*b*) The reason of its being discharged was, because it was only a contempt to the inferior jurisdiction of the Justices, in which case the Court of King's Bench never interposes, S. C. 1 Stra. 567. But in Easter Term, 16 Geo. 2. the Court of King's Bench granted an attachment against the Under-Sheriff of Cumberland, for granting a replevin of goods distrained on a conviction of deer-stealing, Rex v. Monkhouse, 2 Stra. 1184. So also for replevying goods distrained for a fine imposed on an officer by commissioners of land-tax, Rex v. Oliver, Bunb. 14. And in another case, the Court, though they refused to grant an attachment, granted an information against the party for suing a replevin of goods distrained under the highway act, and refused it against the sheriff only, because it did not appear that he knew they were goods distrained under a justice's warrant, Rex v. Sheriff of Leicestershire, 1 Bar. K. B. 110.

Courtnay, v. Collett. 1 *Strange, p.* 635.* A. D. 1724.

The case I mentioned the last time of Courtney *v.* Collet was a plain trespass, and the account I then gave of it from my memory was mistaken: it was Hil. 9 W. 3. in B. R. trespass for taking fishes, necnon pro eo quod he broke down the bank of the river, per quod the water issued and other fishes went away: after verdict for the plaintiff, it was moved in arrest of judgment, that the latter part was case, and not joinable with trespass; but the Court held that was a trespass, and what came under the per quod was only matter of aggravation.

* Cited in Reynolds v. Clark. 1 Stra.634.

The King v. Sir Wm. Lowther. 1 *Stran. p.* 637. A. D. 1726.

No information for erecting a warren.

The Court refused to grant an information in nature of a quo warranto, against Sir William Lowther, for erecting a warren, it being only of a private nature. And *Fortescue*, Justice, said he knew it formerly attempted and denied (*a*).

1 L. Raym. 1409. 1 Sess. Ca. 369. pl. 293. S. C.

(*a*) S. P. in Rex v. Cann, And. 15. Ibbetson's case, Annal. 26.

The King v. Buck. 2 *Strange, p.* 679.

Indictment lies not for killing a hare.

Strange moved to quash an indictment for killing a hare, this not being a matter indictable, the Statute of 5 Ann. c. 14. appointing a summary proceeding before justices of the peace; and cited Rex. v. James, Trin. 1 Geo. where an indictment for keeping an alehouse was quashed, because the Statute 3 Car. 1. c. 3. had directed a particular remedy. Et per Curiam, the indictment must be quashed.

1 Sess. Ca. p. 370. No. 295.

Hill v. Bateman, et al'. 2 *Strange, p.* 710.

Trespass and false imprisonment lies against a justice for committing upon a conviction for destroying game,

The defendant, Bateman, being a justice of peace, had convicted the plaintiff for destroying game, and though, (as it was proved,) the plaintiff had effects of his own which might have been distrained, which were sufficient to answer the penalty he had incurred, yet the defendant sent him immediately to Bridewell, without

A. D. 1726.

where there was no attempt to distrain first. 1 Sess. Ca. p. 344. No. 270. p. 371. No. 297. S. C.

endeavouring to levy the penalty upon his goods; and an action of trespass and false imprisonment being brought against Bateman for this commitment, the Chief Justice was of opinion, that the action well lay (*a*). The other defendant was the constable, who had executed this warrant of commitment; and as to him it was agreed, that the warrant was a sufficient justification, it being in a matter within the jurisdiction of the justice of peace; but if a justice of peace makes a warrant in a case which is plainly out of his jurisdiction, such warrant is no justification to a constable. See 24 Geo. 2. c. 44. (*b*). And it was agreed, that where actions of this kind are brought against justices of peace, they are obliged to shew the regularity of their convictions; and the informations, &c. laid before them upon which their convictions are grounded, must be produced and proved in court (*c*).

Warrant a sufficient justification to a constable in a matter within the justices' jurisdiction, secus where it is plainly out of it.

24 Geo. 2. c. 44.

In these actions justices must shew the regular proceedings.

See 12 East. Rep. 75. Imprisonment. p. 796.

(*a*) Vide Morgan v. Hughes, 2 Term Rep. 225.

(*b*) Vide Shergold v. Holloway, post. 1002. 4 Com. Dig. tit. H. 9. p. 375. 5 Com. Dig. tit. Pleader, 3 M. 22. 3 M. 23.

(*c*) Vide the cases cited in Crips v. Durden, Cowp. 642. So the officer in justifying himself under a warrant, must shew that he acted in obedience thereto. Money v. Leach. 3 Burr. 1742. Lawson v. Clark. cited ib. 1761. 1767.

The King v. Chipp. 2 *Strange*, p. 711.

4 & 5 W. & M. c. 23.

If the information set forth in a conviction for killing game, states the defendant to be an inferior tradesman, without saying that he was a dissolute person, is sufficient.

It need not state that de-

The defendant was convicted upon the statute 4 and 5 W. and M. c. 23. for destroying game; not being a person duly qualified.—*Filmer*, for the defendant, took several exceptions to the conviction. 1. That the information, which was set forth in the conviction, was insufficient to warrant the conviction; for the information only recited that he was an inferior tradesman, but did not shew that he had wasted his substance, or that he was a dissolute person, which are the words of the statute; and therefore it did not appear by this conviction, that the defendant was such a person as was intended by the statute, for he might be an inferior trades-

man, and yet have a sufficient estate to qualify him to hunt, &c. 2. That it was not any where set forth in the conviction, that the defendant did unlawfully hunt; and for any thing which appears in this conviction, the defendant might have bought the hare; and have hunted and killed it in his own yard, which would have been lawful. 3. That the conviction set forth, that information was given to such an one justice of peace, but did not say adtunc a justice; and he might be a justice at present, and not at the time of the information. But the Court over-ruled all the exceptions; and to the first they said, that the statute was in the disjunctive, *viz.* inferior tradesman or dissolute person; and therefore saying that the defendant was either was sufficient. To the second, the Court said, that the statutes forbid such persons as the defendant to hunt at all, and made it criminal for such persons to hunt generally. And in this statute there is no distinction betwixt lawful and unlawful hunting, as there is in the statute against deer-stealers; and they agreed, that in a conviction for deer-stealing, it must be set forth, that the defendant did unlawfully hunt; but in the present case, it need not, because there is no distinction. To the third exception the Court said, that the conviction set forth, that information was made to such an one existen' un' justic', &c. which must be intended, that he was one at that time, and was sufficient without saying adtunc. And so all the exceptions were over-ruled, and the conviction confirmed.

A. D. 1726.

fendant did unlawfully hunt; but it is otherwise in a conviction for deer-stealing. It is set forth that the information was given to a justice of the peace, it need not say adtunc a justice. 1 Sess. Ca. p. 372. pl. 293.

The King v. Hill. 2 *Ld. Raymond, p.* 1415.

The defendant was convicted by Sir Henry Bateman, a justice of the peace of Middlesex, for unlawfully keeping a lurcher and a gun to kill and destroy the game, non existens qualificatus per leges hujus regni ad hoc faciendum, contra formam statuti in hujusmodi casu

A conviction upon the Game Acts must shew specifically that the defendant had

A. D. 1726. not any of the qualifications mentioned in 22 & 23 Car. 2. c. 25. R. acc. Burr. 148. vide Dougl. 331. Str. 66. 1 T. R. 127.

editi et provisi. And this conviction being removed into the King's Bench by certiorari, was quashed Saturday, February 12, 1725, because it was only averred generally, that he was not qualified, and did not aver that the defendant had not the particular qualifications mentioned in the statute as to degree, estate, &c.

Between the Parishes of Kinver and Stone in com' Stafford. 2 Strange's Reports, p. 678.

Renting a coney warren is a settlement. Salk. 536. 2 Sess. Ca. p. 114. no. 109.

Upon a special order of sessions, it was stated, that a poor person rented a coney warren and a cottage upon it at 10*l.* per ann. which the justices were of opinion did not gain him a settlement within the statute of Car. 2. Sed per Curiam, a mill has been held to be a tenement within that statute, and why not this? It is his ability to pay 10*l.* per ann. that is the foundation of the settlement, and whether he pays it for a house for habitation, or for a warren which brings him in a profit, is not material: the order of sessions must be quashed (*a*).

(*a*) Rex v. Piddletrenthide, 3 Term Rep. 772. S. P.

A. D. 1727. A conviction may state an offence to have been committed in a vill, though the statute upon which it is grounded gives part of the forfeiture for such offences to the poor of the parish in which they are committed.

The King v. Wyatt. 2 Lord Raymond's Rep. p. 1478.

The defendant was convicted by Lord Barrimore, a justice of peace for the county of Chester, for that he, not being qualified according to the statute, the 2d of Jan. 13 Geo. at the ville of Mottram Andrews, in the said county, two greyhounds for killing and destroying game illicite in custodia sua habuit et adtunc et ibidem usus fuit to destroy the game, contrary to the statute; for which he was adjudged to forfeit five pounds. This conviction being removed by certiorari into the king's bench, Mr. *Fazakerley* for the defendant took an exception to it, that by the statute of 5 Ann. c. 14. an act for the better preservation of the game, upon which statute this conviction is grounded, by sect. 4. one half of the 5*l.* forfeited is to be paid to the informer, and one

A. D. 1727.

half to the poor of the parish where the offence is committed. But in this case it does not appear, that the offence was committed in any parish, for both the information and the oath of the witness alledge the offence to have been apud villam de Mottram Andrews in comitatu cestriæ, and the judgment of the justice is, quod mihi praefato justiciario constat, quod praedictus P. W. est culpabilis de praemissis praedictis informatione praedicta specificatis et ei impositis modo et forma prout in et per informationem prædictam ei superius allegatur. But there does not appear to be any such parish as Mottram Andrews, and consequently the poor of the parish will be deprived of their moiety of the 5*l.* forfeited.—Sed non allocatur; for per Curiam, if there was such a parish as Mottram Andrews, it shall be prima faciæ intended to be co-extensive with the ville. But if the offence was committed in a ville, which was extra-parochial (which may be) then the informer will have the whole penalty. And the conviction was affirmed May 13, 1727, per totam Curiam.

Jenning v. Mott. Bernadiston's Reports, p. 16.

Where an information shall be granted for a battery notwithstanding the fact is denied.

An information was moved for against the defendant, for coming a sporting on the plaintiff's ground, and beating him in a very grievous manner, because he only came up to him and desired him to go off. The defendant's affidavits directly contradicted the plaintiff's. And therefore Judge *Fortescue* said, the information ought to go, that the fact might be tried. But the rest of the Court said, the rule was not so. Indeed in informations to try a matter of right it does hold, because there you have no other remedy; but in informations of this nature you have, by indictment at the sessions; and therefore where the fact is contradicted positively, the Court does not grant them. However, because it appeared that the defendant was a man of interest in the

A. D. 1727. county, and the plaintiff a poor man, and as the plaintiff had made application to a justice of peace, and he would not take any notice of it, the Court did grant it.

Gweavas v. Kelynac and above one hundred more Defendants. Bunbury's Rep. p. 239.

Bill for tithe of fish. Bunb. pl. 69. Bunb. pl. 332.

Bill for tithe of fish according to the custom; the plaintiff in his bill set forth a former decree establishing this custom in the parish tempore Car. 2. And though there seemed to be no evidence by the defendants against the custom, and the plaintiff had the former decree signed by above one hundred and thirty parishioners, testifying their acquiescence in the decree; yet the Court sent the plaintiff to an issue: reluctante Baron *Hale*.

A. D. 1728. *Gwavas v. Kelynack & al'. Bunb. Rep. p. 256.*

Bill for tithe fish payable by custom to the impropriator.

A bill was preferred by the plaintiff as impropriator of the rectory of Pauli alias Paulin in the county of Cornwal for the tithe of fish, and insisted upon this custom, *viz.* That every parishioner of the said parish and others, being proprietors or occupiers of any fishing-boat, fishing-net or other fishing-craft, which has been usually tied, moored or kept within any part of the rectory or parish, (when not used in fishing,) ought to pay to the impropriate rectors the tenth part of all great and small fish taken in the bay, or adjoining seas, with such boats, nets or fishing craft, except fish used for bait for fishing, and fish meashed in the sleeves of nets, called saynes: and the plaintiff set forth in his bill a decree obtained by his grandfather against about one hundred and thirty parishioners, which was made upon a very solemn hearing, wherein all the then most learned counsel in England were engaged on one side or the other, and whereby the custom, as now alledged, (except only as to the exception of fish meashed in the sleeves,) was

established.—(But nota, the bill in 1680 alledged the custom to be inhabitants, &c. alone, and not "or others, &c."). The plaintiff also now insisted, that a year after the decree one hundred and thirty of the then defendants, by indorsement on the decree, acknowledged the custom, and there had been an acquiescence ever since until the year 1722, which was about forty years. The defendants insisted, first, that they ought not to be bound by this decree, there being only two of the present defendants who were defendants in the former cause. 2dly, That the custom did not extend to driving nets, which of late years had been mostly used, and saynes neglected. 3dly, That it was unreasonable to extend to inhabitants and others, and into adjoining seas out of the parish, and therefore prayed an issue. But the plaintiff's council insisted, that here was sufficient foundation for a decree without sending it to an issue; first, the former decree being so solemnly obtained; 2dly, the indorsement by one hundred and thirty of the then defendants, two of which were now alive, and defendants to this bill; 3dly, constant usage and acquiescence since until the year 1722.—The Lord Chief Baron, and *Comyns*, Baron, seemed to think this a sufficient ground to decree for the plaintiff; but the other barons (Q. *Hale*, Baron) doubting, and upon great importunity of the defendants counsel, an issue was directed to be tried at the bar, to try the custom as laid in the bill, which came on to be tried at Westminster in Cur' Scacc', Nov. 6, 1728; and upon the trial (which lasted fourteen hours) there was a verdict for the plaintiff, though the defendants gave pretty strong evidence, that drift nets were as ancient as saynes, and no tithes had ever been paid for drift fish; (nota, drift nets were looked upon as a fraud upon the custom;) but the authority of the decree, (when the matter was fully considered,) and an acquiescence for forty-one years since, A. D. 1728.

A. D. 1728. was too strong to be got over; and the verdict was to the satisfaction of all the Court, but Baron *Carter*. The defendants appealed from this decree to the House of Lords, which was there heard Feb. 26, 1729, when the decree was affirmed. Mr. *Bunbury* and others for the plaintiff; Serjeant *Stevens* and Mr. *Fazakerley*, &c. for the defendants.

The King v. Thomas Stone. 2 Raym. p. 1545.

1 Saund. 262. c.

The defendant was convicted by a justice of peace of Dorsetshire for killing a fallow deer of the king's in Cranbourne Chase; and the conviction was quashed, because the informer was the witness; divers convictions having been quashed for the same reason before. Nov. 28, 1728.

The King v. William Kent. 2 Raym. p. 1546.

Upon a conviction the defendant's summons, appearance, defence, and conviction must not be stated to have happened on a day before that on which the information is alledged to have been exhibited and the witness examined

The defendant was convicted for keeping a gun for destroying the game, not being qualified by law, &c. And the conviction being removed into the King's Bench by certiorari was quashed, because the information was set out to be exhibited 2d Nov. 1 Geo. 2. and the witness was sworn and made his oath of the truth of the facts contained in the information the said 2d of Nov. 1 Geo. 2. But the summons of the defendant, his appearance, and making defence, and the conviction, was laid to be the 2d of October, 1 Geo. 2. which was before the information and examination of the witness, &c.

The King v. Hawks. 2 Strange's Rep. p. 858.

In convictions there must be a judgment, quod forisfaciat. Fitzg. 124. more full 1 Barn. B. R. 112. 300. S. C.

A conviction for killing a deer was quashed, because it was only convictus est, without any judgment quod forisfaciat (*a*).

(*a*) Rex v. Elwell, Stran. 794. Rex. v. Vipont, 2 Burr. 1163. and the cases there cited. S. P. Rex. v. Chandler, 1 Salk. 378. contra.

Seymour, Bart. qui tam v. Day. 2 Strange's R. p. 899. A. D. 1731.

No new trial in a qui tam after verdict pro def.

The action was for the penalty in killing a hare, not being qualified. And the Jury found for the defendant, contrary to the direction of the Judge. But the Court refused a new trial, saying it had never been carried so far as a penal action (*a*).

(*a*) Vide Mattison qui tam v. Allanson, 2 Stran. 1238. But note, they will grant one where the whole merits of the case have not been laid before the Jury, either through the mistake or mis-direction of the Judge. Wilson v. Rastall, 4 Term. Rep. 758. Vide the cases there cited, and 5 Com. Dig. Pleader, (R. 17.) 502.

Devenish v. Mertins. 7 Mod. Rep. p. 215. A. D. 1734.

In what case double costs shall be awarded. S. C. 2 Barn. 373. 432. 449. S. C. 2 Stra. 974. Bull. N. P. 332.

Trespass for taking away a gun from the plaintiff. The plaintiff discontinued by leave of the Court. *Baines*, Sergeant, moved for the direction of the Court to the master to tax double costs, according to 7 Jac. 1. c. 5. upon producing an affidavit, that the action was brought against the defendant for what he did in the execution of his office as justice of peace under the 5 Ann.—*Lee*, Justice, cited the case of Catheral v. Cowper (*a*), where, in a case of the like nature, a suggestion of the like nature was entered upon the roll, as a foundation to entitle the party to double costs. Mr. *Hayward*, for the plaintiff, insisting that the fact in the affidavit was otherwise, a rule was granted to shew cause why such a suggestion should not be entered, that the party might have an opportunity of controverting the fact. Lord *Hardwicke*, Chief Justice, gave the resolution of the Court. There are two questions: the first, Whether the defendant be entitled to double costs under the Statute Jac. 1.? The second, What is the proper method of awarding them?—As to the first, though it has been insisted upon that there ought to be a previous conviction of the offender, before the justice can justify the taking away the gun,

(*a*) 2 Kely. 59. 2 Bar. K. B. 103. 117.

A. D. 1734. that seems not necessary under this act of the 5 Ann the same authority, by the same clause, being given to lords of manors, who cannot as such convict. It appears plainly by affidavits, that this action was brought against the defendant for what he did in the execution of his office as a justice of peace. As to the second question, no suggestion upon the roll is necessary or proper in this case. All the cases cited, where such a suggestion has been entered, are either after verdict and no certificate by the Judge of Nisi Prius, or after nonsuit; in both these cases a suggestion is very proper, because there a judgment is given for the defendant, which is a proper foundation for entering a suggestion afterwards (*a*). But in the case of a discontinuance no judgment at all is given, but both parties are out of Court, and no costs at all can be given in the common case of discontinuance. Indeed when a discontinuance is with leave of the Court, we always do it upon payment of costs, but the party has his remedy for them on the rule only; the same manner of remedy must be for double costs. Direction was given to the master to tax double costs, and upon payment of them the plaintiff to be at liberty to discontinue.

(*a*) But see Anonymous, 2 Bar. K. B. 171. Anonymous, 2 Vent. 15 and Grindley v. Holloway, Dougl. 294.

Blunt v. Needs. 2 Comyns' Rep. p. 522.

A. D. 1736. In an action qui tam on a statute, it is sufficient to say that a person is not qualified, without shewing that he had not 100*l.* a year, or any other thing which makes a qualification.

Blunt clerk, qui tam pro pauperibus quam pro se ipso, exhibits his bill on the 23d of January, in Hilary term last, against the defendant, an Attorney of this Court, for 40*l.* debt, for that at Holcomb Regis, in the county of Devon, on the 28th of November 1733, the defendant did use a gun to kill and destroy the game, whereas he was not qualified so to do by the laws of the realm; whereby an action accrued to the plaintiff to demand 5*l.* part of the said 40*l.* Secondly, that on the

16th of January 1733, he did keep another gun to kill and destroy the game, not being qualified, &c. for which an action accrued for other 5*l*. Thirdly, that on the same day he exposed to sale six hares against the form of the statute, whereas he was not qualified in his own right to kill game; whereby an action accrued to demand 30*l*. residue of the 40*l*. Defendant pleads that he owes nothing; and in arrest of judgment moved, First, that the first count is not good; since by the Stat. 5 Ann. c. 14. sec. 4. it is enacted, that if any person, not qualified by the laws of this realm so to do, shall keep or use any greyhounds, setting-dogs, hays, lurchers, tunnels, or any other engine to kill and destroy the game, and shall be convicted, &c. before a justice of peace, he shall forfeit 5*l*. But a gun is not mentioned in this act, and therefore when by the Statute 8 Geo. c. 19. it is enacted, that persons liable to be proceeded against before a justice of the peace for any pecuniary penalty or sum for any offence against the law for the preservation of game, may be proceeded against by information before a justice of the peace, or by action of debt, or in case, &c. before the end of the next term after the offence, &c. But debt lies not unless the offence be within the statute 5 Annæ, c. 14. Secondly, it is not sufficient to say that he was not qualified, without shewing that he had not 100*l*. a year, or any other estate which makes a qualification. In the case of the Queen v. George, 6 Mod. 40. in the Queen's Bench, 2 Ann. it was holden that a conviction on the Statute 4 & 5 W. & M. c. 23. shewing that the defendant existens persona dissoluta, &c. did hunt and kill so many hares, &c. ought to be quashed, because it did not shew that he was not qualified. Thirdly, the selling six hares together is but one offence; and by the Statute 9 Ann. c. 25. which enacts, that if any person

A. D. 1736.

lification. In a conviction it is otherwise. 2 Burn's Just. p. 323.

2 Comyns, 525. 577.

A. D 1736. whatsoever, not being qualified in his own right to kill game, shall sell or expose to sale any hare, pheasant, &c. he shall forfeit for every offence such penalty as on higglers, &c. by the Statute 5 Ann. c. 14. is inflicted (*viz.*) the sum of 5*l.* which ought not to be understood 5*l.* for every hare, pheasant, &c. but for all sold at once; but the penalty on higglers, &c. by the Statute 5 Ann. c. 14. is the sum of 5*l.* for every hare, pheasant, &c. As to the first objection, a gun is an engine to destroy the game. So as to the second objection, we have exactly pursued the words of the act; and if the defendant had been qualified, he must shew it. As to the third objection, that all is one offence, the Statute 9 Ann. refers to the Statute 5 Annæ, which gives 5*l.* for every hare, &c. And though it be objected now at last, that the Jury finds but 10*l.* without shewing to which of the offences it is to be applied; it is to be observed, that this is an action of debt for 40*l.* and the several offences after mentioned make up that sum; and the Jury may find that the defendant owes but part of the debt. And per Cur', as to the first objection, the averment of his not being qualified is sufficient, since the words of the act are pursued; and the defendant may come and shew his qualification. Indeed convictions have been quashed for not setting forth what was his want of qualification; because it must be made out before the Justice, that he had no such qualification as the law requires; and therefore the Justice ought to return, that he had no manner of qualification, before he can convict the defendant. As to the second, this is after a verdict; and it is matter of evidence, whether a gun be an engine to kill and destroy game. As to the third, the Statute 9 Ann. saith not that he shall for every offence pay 5*l.* but shall forfeit the penalty of the Statute 5 Ann. on higglers, and which is 5*l.* for every hare, &c. And be-

2 Comyns, p. 278.

Ib. p. 577.

1 Burr. 148.
2. Ld. Raym. 1415.
1 Str. 66.
Dougl. 345.
1 Term Rep. 127.

2 Comyns, p. 523.
Ib. p. 577.

ing a debt, the Jury may find a part of the debt. Judgment was given for the plaintiff. A. D. 1736.

2 Ld. Raym 814.

4 Burr. 2231. 2. Bl. Rep. 1221. Dougl. 6. 1 H. Bl. 219.

Reason v. Lisle. 2 Comyns' Rep. p. 576. A. D. 1738.

In an action of debt upon the Statute 5 Ann. c. 14. for keeping and using a dog to kill the game, it is necessary to shew what sort of dog it was.

This was an action of debt on the Statute 5 Ann. c. 14. on five several offences against that statute. The first and second counts were, that the defendant used an engine called a gun. The third count was, that the defendant kept and used a dog to kill and destroy the game, not being qualified by the statutes of this realm so to do. The fourth count was, that the defendant exposed to sale an hare, not being entitled to the said hare under any person qualified to kill game. The fifth count was, that the defendant exposed a pheasant to sale, not being entitled under any person qualified to kill game. After Nil debet pleaded, a verdict was found for the plaintiff and damages. And now the defendant moved in arrest of judgment, and took several exceptions. First, that it does not appear on which count the damages are found. Sed non allocatur; for it is frequent when several counts are in a declaration, that damages are given more or less than the sum in any one count, and yet holden well. Secondly, that the two first counts are for keeping or using a gun, whereas a gun is not mentioned in the statute. Sed non allocatur; for if he had been charged for using a gun to destroy the game contrary to the form of the statute, this after a verdict had been sufficient; for the statute saith, if any use tunnels or any other engine to destroy the game; and after a verdict for the plaintiff the Court must intend, that the Jury thought a gun an engine to destroy the game; and so it was resolved in this Court between Blewit qui tam, &c. ver. Needs. But here the declaration saith that the defendant used a certain en-

2 Comyns, p. 524.

2 Comyns, p. 525. 525.

A. D. 1738. gine called a gun, which is not so strong as the case of Blewit and Needs. Thirdly, the plaintiff does not alledge, that the defendant was not qualified by the laws of this realm, but that he was not qualified by the statutes of this realm, and a person may be qualified by law to hunt, though not qualified by the statute law; which is in the negative, that not having such an estate he shall not be qualified. Sed non allocatur: for the words may well import as much as being unqualified, or not qualified. Fourthly, that in the third count the plaintiff declares, that the defendant kept and used a dog to kill the game, without saying what sort of a dog; it might be a mastiff dog, or a lap-dog, which might chance to kill game; and the statute, 5 Annæ, c. 14. upon which this action is founded, mentions only greyhounds, setting-dogs and lurchers. And therefore the action for the penalty given by this statute ought to conform to it, and shall not by extended be equity, being a penal law. And though the Statute 22 & 23 Car. 2. cap. 25. mentions dogs generally, and that be confirmed by this statute, yet it doth not give the penalty of 5*l.* to every thing forbidden by that statute, wherein the penalty is 20*l.* only. And of this opinion was the whole Court. Fifthly, it was excepted, that the two last counts alledge the facts against the form of the statutes; whereas there is but one statute against exposing hares, &c. to sale. But the Court took no regard to this exception, for there are several acts about hares, &c. And the Statute 9 Annæ, c. 25. relates to this matter. But for the fourth exception the judgment was arrested (*a*).

(*a*) In the case of Hooker v. Wilks, (which was an action of debt upon the Stat. 8 Geo. 1. c. 19. for using an Hound to destroy game,) after a verdict for the plaintiff, the judgment was arrested, because the Stat. 5 Ann. c. 14. has not the word Hound; and the words other engines coming after tunnels, &c. are applicable only to inanimate things. And that being a penal law, could not be extended. 2 Str. 1126.

Wickham v. Walker. Barnes, p. 125. A. D. 1758.

Defendant, an inferior tradesman, hunts in company with a person qualified, who kills a hare, and defendant being sued on Statute — Ann. Plaintiff obtained a verdict, and a point reserved, whether the defendant was liable to costs, was argued. The Court was of opinion, that defendant being found by the Jury to be an inferior tradesman (a clothier and alehouse-keeper) is within the statute which was made to prevent such people from mispending their time: defendant's trade is as much neglected when he hunts with a qualified person, as without.—Per *Holt*. Every tradesman not qualified, is an inferior tradesman, and, though qualified, he cannot hunt in any person's ground but his own. Defendant must pay costs.—*Eyre* for plaintiff.—*Agar* for defendant.

Davies v. Powell & six others. Wiles's Rep. p. 46. A. D. 1738.

Deer in an enclosed ground may be destroyed for injury. Sp. C. Co. 11 Co. 7 b. 1 Ld. Raym. 249. 2 Ld. Raym. S. C.

The following opinion of the Court was thus given by Willis, Lord Chief Justice: "Trespass for breaking and entering the close of the plaintiff called Caversham Park, containing six hundred acres of land, in the parish of Caversham, in the county of Oxford, for treading down the grass, and for chasing, taking and carrying away diversas feras, videlicit, one hundred bucks, one hundred does, and sixty fawns of the value of 600*l.* of the said plaintiff inclusas et coarctatas in the said close of the said plaintiff. Damage 700*l.* The defendants all join in the same plea; and as to the force and arms, &c. they plead not guilty: but as to the residue of the trespass they justify as servants of Charles Lord Cadogan; and set forth that the place where, &c. at the time when, &c. was and is a park, enclosed and fenced with pales and rails, called and known by the name of Caversham Park, &c.; and that the said Lord Cadogan was seised thereof, and also of a messuage, &c. in his demesne as of fee, and being so seised on the 3d

A. D. 1738 of August, 1730, by indenture demised the same to the plaintiff by the name (inter alia) of all the said park called Caversham Park, from Lady-day then last past, for the term of seven years, under the rent of 124*l.* 2*s.* The deer are not particularly demised, but there is a covenant that the plaintiff, his executors and administrators, should from time to time, during the term, keep the full number of one hundred living deer, in and upon the said demised premises, or in or upon some parts thereof. And Lord Cadogan covenants to allow the plaintiff in the winter, yearly, during the term, twenty loads of boughs and lops of trees for browse for his deer to feed on, calling them there, as he does in other parts of the lease, "the deer of the said John Davies;" and likewise covenants, that if the plaintiff shall, on the feast of St. Michael next before the expiration thereof, pay Lord Cadogan all the rent that would be due at the expiration of the lease, then the plaintiff, his executors, &c. might sell and dispose of any or all of the deer that he or they should have in the said park at any time in the last year of the said term, any thing in the said indenture to the contrary thereof in anywise notwithstanding. And the defendants justify taking the said deer as a distress for 186*l.* rent due at St. Thomas-day, 1731; and say that they did seize, chase and drive away the said deer in the declaration mentioned then and there found, "being the property of and belonging to the said John Davies," in the name of a distress for the said rent; and then set forth that they complied with the several requisites directed by the act concerning distresses, (and to which there is no objection taken;) that the deer were appraised at 161*l.* 15*s.* 6*d.*, and that they were afterwards sold for 86*l.* 19*s.* being the best price they could get for the same; and that the said sum was paid to Lord Cadogan towards satisfaction of the rent in arrear; and that in

taking such distress they did as little damage as they could. To this plea the plaintiff demurs generally, and the defendants join in demurrer. And the single question that was submitted to the judgment of the Court is, whether these deer under these circumstances, as they are set forth in the pleadings, were distrainable or not. It was insisted (*a*) for the plaintiff that they were not; 1st, Because they were feræ naturæ, and no one can have absolute property in them. 2dly, Because they are not chattels, but are to be considered as hereditaments and incident to the park. 3dly, Because, if not hereditaments, they were at least part of the thing demised. 4thly, Their last argument was drawn ab inusitato, because there is no instance in which deer have been adjudged to be distrainable. First; to support the first objection, and which was principally relied on by the counsel for the plaintiff, they cited Finch, 176.; Bro. Abr. tit. "property," pl. 20.; Keilway, 30. b. Co. Lit. 47. a. 1 Rol. Abr. 666. and several other old books, wherein it is laid down as a rule that deer are not distrainable; and the case of Mallocke v. Eastly, 3 Lev. 227. where it was holden that trespass will not lie for deer, unless it appears that they are tame and reclaimed. They likewise cited 3 Inst. 109, 110. and 1 Hawk. P.C. 94. to prove that it is not felony to take away deer, conies, &c. unless tame and reclaimed. I do admit that it is generally laid down as a rule in the old books, that deer, conies, &c. are feræ naturæ, and that they are not distrainable; and a man only have a property in them ratione loci. And therefore in the Case of Swans, 7 Co. 15, 16, 17, 18. and in several other books there cited, it is laid down as a rule that were a man brings an action for chasing and taking away deer, hares, rabbits, &c. he shall not say

A.D. 1738.

Suttar v. Maads. Lord Raymond.

(*a*) This case was argued in Michaelmas, 1737, by Wright, Sergt. for the plaintiff, and Eyre, King's Sergt. for the defendants.

A. D. 1738. *suos*, because he has them only for his game and pleasure ratione privilegii whilst they are in his park, warren, &c. But there are writs in the Register, fo. 102, a book of the greatest authority, and several other places in that book which shew that this rule is not always adhered to. The writ in fo. 102, is "quare clausum ipsius A. fregit et intravit, & cuniculos suos cepit." The reason given for this opinion in the books why they are are not distrainable is that a man can have no valuable property in them. But the rule is plainly too general; for the rule in Co. Lit. is extended to dogs; yet it is clear now that a man may have a valuable property in a dog. Trover has been several times brought for a dog, and great damages have been recovered. Besides the nature of things is now very much altered, and the reason which is given for the rule fails. Deer were formerly kept only in forests or chases, or such parks as were parks either by grant or prescription, and were considered rather as things of pleasure than of profit: but now they are frequently kept in enclosed grounds, which are not properly parks, and are kept principally for the sake of profit, and therefore must be considered as other cattle. And that this is the case of the deer which are distrained in the present case is admitted in the pleadings. The plaintiff by bringing an action of trespass for them in some measure admits himself to have a property in them: and they are laid to be inclusas et coarctatas in his close, which at least gave him a property ratione loci; and they are laid to be taken and distrained there: but what follows makes it still stronger; for in the demise set forth in the plea, and on which the question depends, they are several times called the deer of John Davies the plaintiff, and he is at liberty to dispose of them as his own before the expiration of the term on the condition there mentioned. And it is expressly said that the defendants

distrained, the deer being the property of the said John Davies: it is also plain that he had a valuable property in them, they having been sold for 86*l.* 19*s.*; both which facts are admitted by the demurrer. The plaintiff therefore in this case is estopped to say either that he had no property in them, or that his property was of no value. Besides it is expressly said in Bro. Abr. tit. "property," pl. 44. and agreed in all the books, that if deer or any other things feræ naturæ become tame, a man may have a property in them. And if a man steel such deer, it is certainly felony, as is admitted in 3 Inst. 110. and Hawk. P. C. in the place before cited (*a*). Upon a supposition, therefore, which I do not admit to be law now, that a man can have no property in any but tame deer, these must be taken to be tame deer, because it is admitted that the plaintiff had a property in them. Secondly; as to their not being chattels but hereditaments and incident to the park, and so not distrainable, several cases were cited; Co. Lit. 47. b. and 7 Co. 17. b.; where it is said that if the owner of a park die, the deer shall go to his heir and not to his executors; and the Statute of Marlbridge, 52 Hen. 3. c. 22. where it is said that no one shall distrain his tenants de libero tenemento suo nec de aliquibus ad liberum tenementum spectantibus. I do admit the rule A.D. 1738.

(*a*) The legislature have also made provisions at different times for the protection of deer in forests and open as well as enclosed grounds. But by the Stat. 16 Geo. 3. c. 30. all the former acts relating to this subject (except that of 9 Geo. 1. c. 22.) are expressly repealed by name; and it has since been holden by all the judges that that also, as far as it made it a capital offence to steal, destroy, or steel deer, was virtually repealed; Rex. v. Davies, 1782. The Stat. 16 Geo. 3. c. 30. inflicts a penalty of 30*l.* on persons who kill, wound or destroy, or take in any snare, &c. or carry away any red or fallow deer in any forest, chase, purlieu or ancient walk, whether enclosed or not, or in any enclosed park, paddock, wood, or other enclosed ground where deer are usually kept without the consent of the owner, &c. or aid therein; and a penalty of 20*l.* on persons who course, hunt, shoot at or otherwise attempt to kill, wound or destroy any such deer, &c. or aid therein, &c.; and a double penalty on the keepers for either of those offences; and it subjects the offender to transportation for seven years for a second offence.

A. D. 1738. that hereditaments or things annexed to the freehold (*a*) are not distrainable; and possibly in the case of a park, properly so called, which must be either by grant or prescription, the deer may in some measure be said to be incident to the park: but it does not appear that this is such a park, nay it must be taken not to be so. In the declaration it is styled the close of the plaintiff, called Caversham Park. In the plea indeed it is styled a park, called Caversham Park: but it is not said that it is a park either by grant or prescription; and it cannot be taken to be so on these pleadings, but must be taken to be a close where deer have been kept, and which therefore has obtained the name of a park, because the deer, as I mentioned before, are called the deer of John Davies, and because he is at liberty to sell them, and so to sever them from the park before the expiration of the term. And in Hale's History of the Pleas of the Crown, 1 vol. fo. 491. cited for the defendants, it is expressly said that there may be a park in reputation, "as if a man enclose a piece of ground and put deer in it, but that makes it not a park without a prescription time out of mind or the king's charter." Vid. stat. 21 Ed. 1. de malefactoribus in parcis there referred to. Thirdly; as to the third objection, that the deer are part of the thing demised, and consequently not distrainable; the only case which was cited to prove this was the Case of Tithes (*b*) which is nothing

(*a*) "Furnaces, caldrons and the like fixed to the freehold, or the doors or windows of a house and the like, cannot be distrained. Co. Lit. 47. b. Bro. Abr. "Distress," pl. 23.—Neither can a lime-kiln, if affixed to the freehold, be distrained. But where the plaintiff in replevin declared for taking his goods and chattles, to wit, a lime-kiln; and the defendant avowed taking it as a distress for rent in arrear; and the plaintiff in his plea in bar said that the lime-kiln was affixed to the freehold, it was holden, on demurrer, that the plea in bar was a departure from the declaration which asserted it to be a chattel; though, had it been a portable oven, it might have been distrained; and judgment was given for the defendant. Nicholl v. Smith, 4 Durnf. & East. 504.

(*b*) Vid. Bro. Abr. tit. "Distress," pl 81; tit. "Dette," pl. 234; 1 Pol Ab. 667, pl. 18; and Finch. 135,6.

to the purpose: because where tithes only are let a man cannot reserve a rent, it being only a personal contract. Without denying the rule, which I believe is generally true, the fact here will not warrant it, for they are not part of the thing demised. They are not mentioned in the description of the particulars, and cannot be part of the thing demised for the reason before given, because they may be sold and disposed of by the plaintiff before the expiration of the demise. Fourthly; the last argument, drawn ab inusitato, though generally a very good one, does not hold in the present case. When the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure and not for profit, and were not sold and turned into money as they are now. But now they are become as much a sort of husbandry as horses, cows, sheep, or any other cattle. Whenever they are so, and it is universally known, it would be ridiculous to say that when they are kept merely for profit they are not distrainable as other cattle, though it has been holden that they were not so when they were kept only for pleasure. The rules concerning personal estates, which were laid down when personal estates were but small in proportion to lands, are quite varied both in courts of law and equity, now that personal estates are so much increased and become so considerable a part of the property of this kingdom. Therefore, without contradicting the reasons which are laid down concerning this matter in the ancient books, and without determining any thing with respect to deer in forests and chases or parks, properly so called, concerning which we do not think it necessary to determine any thing at present, we are all of opinion that we are well warranted by the pleadings to determine that these deer, under the circumstances in which they appear

A.D. 1736.

A. D. 1738. to have been at the time when this distress was taken, were properly and legally distrained for the rent that was in arrear. There must therefore be judgment for the defendants (*a*)."

(*a*) Vid. Simpson v. Hartopp, M. 18 Geo. 2 Willes, 512.

A. D. 1739. *Davis v. Powell.* 7 *Mod. p.* 249.

Deer may be distrained for rent.

Trespass for distraining the plaintiff's deer. The defendant justified as servant of Lord Cadogan, who had leased to the plaintiff thirty acres of land, upon which he (the plaintiff) was to keep one hundred deer, and to have liberty to sell them at the expiration of the term; but the plaintiff being in arrear to my lord for rent, the defendant distrained the deer. The question was, Whether deer are distrainable or not? It was said by the plaintiff's counsel, that the deer being feræ naturæ are not distrainable (*a*). It was alledged for the defendant, that the nature of things changes, and with them the reason of the law; and though formerly deer being considered feræ naturæ could not be distrained, being then kept for pleasure, yet they are now chiefly kept for profit; and therefore that reason fails now. And judgment was given for the defendant.

(*a*) Finch, 126. Co. Lit. 47. 1 Roll. Abr. 666. 3 Lev. 227. 7 Co. 17. 3 Inst, 109. Hawk. P. C. 124.

The King v Gardiner. Andrews, p. 255.

S. C. 2 Stra. 1093. 2 Sess. Ca. 365. The mere keeping a gun, unless it be for destroying game, is no offence.

Motion by Mr. *Denison* to quash a conviction upon the Statute of 5 A. c. 14. s. 4. which set out, that the defendant "unlawfully had and kept in his custody a gun, being an engine or instrument for destroying game, contrary to the form of the statute in that case made and provided." And he objected, that this is no sufficient charge within the 5 A. or any other of the laws relating to the game. For it is not said, that the defendant used the gun for the destruction of game; and

a gun is not an instrument so far appropriated to killing game, as that it is criminal for a person to have one in his custody only. And it would have been altogether as well if it had been said, that the defendant had a cane, &c. which may possibly be used for the purpose of killing game. And he cited The King and King, 1 Sess.Ca.93. East. 3 G. 1. The defendant there was convicted, for that quoddam tormentum, being an engine to destroy game, custodivit, &c. And upon motion by Sergeant Whitaker to quash this conviction, he urged, that the 5 A. doth not extend to the bare keeping a gun; but the only offences intended to be prevented by the act are, the keeping of engines appropriated to, and which can only be used in, the destroying of game; and also the actual killing of game. And he further argued, that the word (gun) is not mentioned in the statute, and it cannot come within the meaning of the words (or other engines), because it is properly an engine, not for the killing game, but for the defence of a man's house. There was no determination in this case; but *Parker*, Chief Justice, and the two justices *Powis* and *Pratt*, were of that opinion: but *Samuel Eyre*, Justice, seemed to think, that a gun is an engine within this statute, because it is mentioned in 22 Car. 2. c. 25. On the other side it was now argued by Solicitor-general *Strange*, that the Statute of 5 A. is in the disjunctive; that "if any person, &c. shall keep or use any greyhound, &c. tunnels, or any other engine to kill or destroy the game, &c." so that if any one keeps such an engine as may destroy game, it is sufficient upon this act. Now a person may certainly have a gun for destroying game; and that it is a proper instrument for that purpose appears by the Statute of Car. 2. And all the acts of the legislature must be supposed to be consistent. Mr. Solicitor also cited The King and Styles, Hill. 8 G. 1. where it was objected to a conviction for keeping Qu. Filer. 1 Stra. 496.

A. D. 1702.

A. D. 1739. a lurcher, that it did not appear the defendant used it to destroy game. But the Court held the conviction to be good ; on this act, because it is in the disjunctive. And Mr. Solicitor also argued, that the defendant has here in effect confessed that he kept a gun for destroying game; for it is charged in the conviction, that "he unlawfully kept in his custody a gun, being an engine or instrument for destroying game;" and afterwards it is stated, that he "was asked if he could say any thing why he should not be convicted, &c. and because he said nothing in his defence, but confessed the premisses as before charged, &c. To this last point it was answered by the Court, that the defendant's confession extends only to the charge as it is laid in the information ; the legality of which it is the part not of the defendant, but of the Court to judge of. And if it be not in itself sufficient, the confession will not enlarge it. And the whole Court were clearly of opinion, that this conviction is not good. For (as they argued) if the Statute of 5 A. is to be construed in so extensive a manner as to extend to the bare having of any instrument that may possibly be used in destroying game, it will be attended with very great inconvenience, there being scarce any, though ever so useful, but what may be applied to that purpose. And though a gun may be used in destroying game, (and when it is, it then falls within the words of the act,) yet as it is an instrument proper, and frequently necessary to be kept and used for other purposes, as the killing of noxious vermin, or the like, it is not the having a gun, without applying it in the destruction of game, that is prohibited by the act. The words therefore, "or other engine," (as *Lee*, Chief Justice, said,) must be understood of such instruments as are applicable only to the destruction of game, as hare-pipes, &c. or of such as are actually employed in that way. And *Chapple*, Justice, said, that if such things

as are enumerated in the statute, and are peculiarly fitted or disposed for killing game, as hare-pipes, lurchers, &c. are kept by an unqualified person, yet it must be averred that they are kept to kill game, which in the present case would have been sufficient; and in that case it would be incumbent on the person having such things in his custody to prove that he kept them for other purposes. And supposing this to be the fact, and that he never used them in killing game, he would not be punishable.—And *Page*, Justice, said, he remembered a case in Lord Holt's time, where it was held, that the keeping a lurcher, without using it in killing game, was not within the Statute of Car. 2. though it be expressly named therein. Besides, as these acts restrain the liberty which was allowed by the common law, and are also penal, they ought not to be extended further than they must necessarily be.—And *Probyn*, Justice, said, that as the legislature had the Act of Car. 2. before them when this was made, they would probably have mentioned guns expressly, if they had intended to prohibit the having them in a person's custody. And therefore it is not without design that the word is omitted. The conviction was therefore quashed. A. D. 1739.

Note.—After the Court had delivered their opinion, Mr. Solicitor said, that in the Case cited of The King and King, Lord Macclesfield said, that he was in the House of Commons when the Act of 5 A. was made and he himself objected to the inserting of the word (gun) therein, because it might be attended with great inconvenience.

S. P. Wingfield v. Stratford, Say. 15. 1 Wils. 315. See Avery v. Hoole, Cowp. 825. Rex v. Thomson, 2 Term Rep. B. R. 18. Rex v. Hartley. Cald. 175.

The King v. Gardner. 2 Strange, p. 1098.

The defendant was convicted by a justice of peace for keeping a gun, contrary to 5 Ann. c. 14. And it The bare keeping a gun is no

A. D. 1739. was objected, that a gun is not mentioned in that statute, and though there are many things for the bare keeping of which a man may be convicted; yet there are only such as can only be used for destruction of the game, whereas a gun is necessary for defence of a house, or for a farmer to shoot crows.—*E contra* it was said, that a gun is mentioned in 22 and 23 Car. 2. c. 25. and considered there as an engine; and the 5 Ann. having the general words other engines, shall therefore be taken to include a gun.—Sed per Curiam, This was made a question in the case of the King v. King, Pasch. 3 Geo. but never determined. And upon consideration we are of opinion that a gun differs from nets and dogs, which can only be kept for an ill purpose, and therefore this conviction must be quashed (*a*).

Cause of conviction.

2 Sess. Ca. p. 385. no. 204. Andr. 255. S. C. 14 Vin. Abr. 3.

(*a*) Rex v. Filer, 2 Stra. 495. Wingfield v. Stratford, Say. Rep. 15. 1 Wils. 315. S. C. Rex v. Hunt, E. 15 Geo. 3. Dougl. 683. [1] Avery v. Hoole, Cowp. 825. Rex v. Hartley, C. Bl. 175. Rex v. Thompson, 2 Term Rep. 18.

The King v. Gardner. 7 Mod. p. 279.

A penal information on 5 Anne, c. 14. charging that the defendant "kept a gun contrary to the statute, being an instrument to destroy game," is not maintainable, although the conviction state that the defendant confessed the charge.

S. C. 2. Sess. Cases, 385. S. C. 2 Stra. 1098. S.C And. 255.

The defendant was convicted before a justice of the peace upon the Statute 5 Anne, c. 14. for that he kept a gun contrary to the statute, being an engine to destroy game; which charge the defendant confessed before the said justice of the peace. And exceptions being taken to this conviction—*Strange*, Solicitor-general, for the plaintiff, strongly insisted upon the defendant's confession; and argued, that the keeping a gun to kill game was within the statute; and that the words of the act (sect. 4.) being in the disjunctive, "keep or use," the doing either one or the other was a sufficient offence within the statute.—*Denison*, for the defendant, excepted against the conviction, and insisted, that the charge against the defendant being insufficient, his confession of it must be so too: that the charge in this conviction is no offence against that act, or any other, *viz.* that he kept a gun, being an engine to destroy game; and

therefore it might as well have been said, he kept a cane contrary to the statute, being an engine to destroy game; for it does not appear that he actually did kill any game. And to charge only that he kept a gun is improper, for it includes every man that keeps a gun. And the conviction only saying, that he kept a gun contrary to the statute, being an engine to destroy game, these latter words are but in the nature of a description, and limit the former ones to those only who make that use of it: that a gun is not properly an engine to destroy game, unless it is put to that use, but it is for the defence of a man's house, as well as a sword, which might perhaps be applied to destroy game. The Statute 22 and 23 Car. 2. c. 25. does not mention guns, but that word is properly omitted in the Statute 5 Anne, c. 14; for this act can only mean such instruments as are merely applicable to destroy game, as snares, &c.; otherwise any man who has a gun may undergo the same conviction.—*Lee*, Chief Justice. There is great weight in the objection to this conviction. The word "gun" is omitted in the fourth clause of this Statute of 5 Anne, c. 14; and the general words of this act are not extensive enough to take in every instrument for the destruction of game, but such only as is expressly used for and applicable to the destruction of game, and perhaps to no other purpose. And they do not extend to prohibit a man from keeping a gun for his necessary defence, but only from making that forbidden use of it. And the word "gun" being purposely omitted in this act, the defendant is not within the penalty.—*Page*, Justice, of the same opinion. *Probyn*, Justice. The objection, that the defendant has confessed this charge, has been well answered, for the confession can be carried no farther than the charge itself, and that being insufficient the conviction ought to be quashed. The engines prohibited by this act must be such as are kept on purpose to destroy game; and A. D. 1789.

A. D. 1789. it must appear by evidence that they have been so used, to bring the offence within the Statute 5 Anne, in which the legislature did purposely omit the word "gun," because farmers are generally obliged to keep a gun, and are no more within the act for doing so than they are for keeping a cabbage-net: the conviction ought to be quashed.—*Chapple*, Justice, of the same opinion; and that the reason the words of the act are in the disjunctive, "keeping or using, &c." is, because people use other folks' dogs; and if they do, they are within the act. And the keeping of them must be averred to be on purpose only to destroy the game.—*Lee*, Chief Justice. The conviction must be quashed (*a*).

(*a*) See Rex v. Filer, 1 Stra. 496. Wingfield v. Stratford, Sayer, 15. S. C. 1 Wils. 315. Rex v. Hunt, Dougl. 683. Avery v. Hoole, Cowp. 825. Rex v. Hartley, Cald. 175. Rex v. Thompson, 2 Term Rep. 18.

The King v. Blaney. Andrews, p. 240.

Conviction founded on the evidence of the informer only, quashed. Ante, 18. Rex v. Piercy, S. P.

Motion by Mr. *Willes* to quash a conviction upon the Statute of 5 A. c. 14. (s. 4.) because, 1. This is a conviction for two distinct offences, *viz.* for hunting with setting-dogs and nets, and also for having the goods in the defendant's house; whereas both these things constitute but one offence, and for which there is but one forfeiture. The intent of the legislature was, to punish every person who shall kill game that is unqualified; and the having dogs, &c. in the house is only considered as evidence of the killing game, as it may be difficult to find persons actually committing the fact. And the words of the act, "keep or use," ought to be construed in this manner; that if a person keeps dogs, &c. though it be not or cannot be proved that he uses them, he shall be punished; and so vice versâ; but the meaning is not, that if he does both, he shall be punished for each; which would be punishing him twice for the same offence. 2. Supposing that these are two distinct offences, and punishable severally,

there ought to have been two distinct convictions, all one as there must be two indictments for two distinct crimes. 3. It ought to be alledged, but it is not, that the facts were committed against the form of the statute. In an indictment for perjury where this is not averred, the party is punishable at common law only. And this case is stronger than that, because here the justices have no authority by the common law; and nothing can be intended to give a jurisdiction. 4. No forfeiture is imposed by this conviction, and consequently it is incomplete, and all one as a verdict without judgment. And in The King and Buells, (*a*). (Hill. 3. G. 2.) a conviction for deer-stealing was held ill, for this very fault. 5. This conviction appears to be founded only on the evidence of the informer. And this last exception was admitted by Mr. *Yeates*, who was the prosecutor's counsel, to be fatal. And he said, that though in 3 Mod. 114. it is disallowed, it is now otherwise. Upon this objection, therefore, (without giving any opinion in relation to the others,) the Court quashed the conviction.

A. D. 1739.

V. Rex v. Salomons, 1 Term Rep. B. R. 249.

(*a*) V. Rex v. Hawks, 2 Stra. 853. Fitz G. 121. S. P.

S. P. Regina v. Cobbold, Gilb. Rep. B. R. 111. on the same statute.

The King v. Dore. Andrews, p. 302.

Conviction upon the Statute of 3 W. and M. c. 10. against deer-stealing. And the conviction set forth, that 30th May, 1738. one T. B. informed Lord D. being a justice of peace, &c. that defendant 9 May, &c. in a certain forest of the king called New Forest, killed, took, and carried away one red deer, &c. without the consent of the king, or the keeper of the said forest. And it also set out, that one W. S. on the 10th of the same May, saw a red deer in the custody of defendant, and the defendant owned to him that he on the "day then before" unlawfully hunted and killed the deer then

A man may be convicted of deer-stealing upon his confession to a witness, who deposes before the justice. Though it does not appear that he confessed the killing the deer mentioned in the information. Qu.

A. D. 1739. in his custody, &c. And it was moved by Mr. *Filmer* to quash this conviction; 1. Because it is founded on a confession of the defendant made only to the witness; whereas by the statute, the evidence ought to be "by the confession of the party, or by the oath of one or more credible witness or witnesses, before one or more justices." So that the confession is not sufficient, unless it be made before the justice. 2. It is uncertain whether the deer, for the killing of which the defendant is convicted, be the same deer, for the killing of which he is informed against. For the words (on the day then before) may be understood, not only of the day next before, but also of any other day before the 10th of May. On the other side it was argued by Solicitor-general *Strange*, and so resolved by the Court, 1. That though the confession mentioned in the act, and there opposed to the oath of the witness, must be before the justice; yet whatever the party hath owned to the witness, he may properly depose, and this is good evidence to ground a conviction upon, as by the oath of a witness. And *Probyn*, Justice, remembered a case, where the oaths of two witnesses were required by act of parliament, and there the confession of the party before two persons, and attested by them, was held sufficient. 2. Though what is stated by way of evidence does not sufficiently shew that the defendant killed the same deer which is mentioned in the information, yet it fully shews that he killed the deer then in his custody, for which alone he might be convicted: and the words (then before) are to be understood according to common parlance, and to mean the day next before. The conviction was therefore confirmed. Ex relatione alterius.

N. By 16 Geo. 3. c. 30. the former acts relating to deer-stealing are repealed.

The King v. Dore. Andrews, p. 352.

Upon affirmance of a con- A conviction against the defendant for deer-stealing,

having been removed by certiorari, and affirmed in this court, it was moved by Mr. *Filmer*, that the costs be referred to the master for taxation in an adversary way; the defendant having given a bond for the costs, pursuant to the Statute of 3 W. and M. c. 10. s. 6. Against this it was argued by Solicitor-general *Strange*, that an affidavit having been made by the prosecutor that every penny set down in the bill of costs hath been paid by him, he ought to be reimbursed the same, it being the design of the act, that the prosecutor should have nothing to pay even to his own attorney. Whereas upon strict taxations, many items are always disallowed or lessened.—But per Cur': Although the words of the act are "full costs and damages," yet the prosecutor ought not to have such allowed as are unusual or unreasonable. And it is for the benefit of the defendant* that an affidavit is required; the reason thereof being, that there may be such costs as cannot be proved but on the oath of the prosecutor.—And *Probyn*, Justice, said, that the bill ought to be taxed as between attorney and client. A rule was therefore granted for referring the bill to the Master.

A. D. 1739. viction for deer-stealing the prosecutor's costs are to be taxed as between attorney and client.

* Qu. Prosecutor?

The King v. Towning and others. Andrews, p. 303.

Indictment against the defendants for having in their custody eight nets and two guns for catching hares, &c. to which the defendants demur.—And it was objected by Mr. *Denison*, 1. That it doth not appear in this indictment that the defendants were not qualified persons; and in the Case of The King and Bryan, the other day, the Court seemed to be of opinion, that this is necessary to be shewn in proceedings on the Game-Laws. 2. The matter here charged is not indictable, as this is no offence at common-law, and an indictment is not a remedy prescribed by the statutes relating to this subject. 1 Show. 398. Salk. 45. 460. King and

Demurrer to indictment for having nets and guns for killing hares allowed. 1 J. 1. c. 27. s. 3. And. 289.

A. D. 1739. Sterne, Hil. 4 G. 1. In that case this exception was taken, by Serjeant *Whitaker*, to an indictment for catching an hare. 3. In the caption of this indictment it is not said, that it was "then and there sworn." And no counsel appearing on the other side, judgment was immediately given for the defendant.

S. P. Rex v. Buck, Stra. 679. This third objection was over-ruled in 1 Ld. Ray. 548.

Mr. *Denison* at the same time took the same exceptions as above to the caption of another indictment against the same defendants. And he also objected, that it does not appear to what time the sessions were adjourned. And judgment was there given for the defendants, no counsel appearing on the other side. Ex relatione alterius.

A. D. 1740. *The King v. Calcutt and Monk.* 2 *Strange*, p. 1119. There were five several convictions for deer-stealing returned, four of which being either for killing, or aiding in killing deer, in Waltham forest, had no objections made to them that are worth taking notice of; but as to the fifth, which was for deer-stealing in a purlieu of the forest, it was objected, That it was not averred, that deer were usually kept in the purlieu, but only that they were usually kept in the forest, whereas by 3 W. and M. c. 10. that seems to be required. The clause is, "If any person shall unlawfully course, &c. any red or fallow deer in any forest, chase, purlieu, paddock, wood, park, or other ground enclosed, where deer have or shall be usually kept, without the consent of the owner, or person chiefly intrusted with the custody thereof, or shall be aiding or assisting therein, and shall be convicted thereof, he shall forfeit, &c." To this it was answered by Mr. Solicitor-general, That such averment could not extend to a purlieu, for 4 Inst. 303. describes it as a place where by law deer cannot be kept, it being disafforested as well with regard to all others as the owner, and the oath of the ranger, 304. is to drive deer out of

Deer stealers. Vide 16 Geo. 3. c. 30.

3 W. and M. c. 10.

the purlieu into the forest. Manwood, 292. Secondly, The averment as to forests, chases, and purlieus, is not made necessary by the act, for the words "where deer are usually kept" extend only to ground enclosed; else the words "other ground" will make it necessary to aver that the forest, &c. was enclosed, which is not the case in any part of England. Et per Curiam, The answer is right in both respects. Another objection was, that it did not appear, but that the defendant was owner of the purlieu; in which case he had a right to chase the deer off his ground.—Sed per Curiam, That would be matter of defence, and should be shewn on his part, according to the resolution in the case of King v. Bryan, (Stra. 1101). so the convictions were confirmed.

A. D. 1740. 1 rem. Ent. 329. No such averment as to a park.

Hooker v. Wilks. 2 *Strange*, p. 1126.

Debt on 8 Geo. 1. c. 19. for the penalty of 30*l.* by using a hound to destroy game. And after a verdict for the plaintiff, the judgment was arrested, for 5 Ann. c. 14. has not the word hound, and the words "other engines" come after nets, &c. and are applicable only to inanimate things. And this being a penal law cannot be extended. The Statute 22 and 23 Car. 2. c. 25. has indeed general words, "or any other dogs to destroy game," but this is not a conviction on that statute (*a*).

(*a*) Vide Reason v. Lisle, Com. Rep. 576.

8 Geo. 1. c. 19. Hound not within 5 Ann c. 14. Cald. 177.

The King v. Duke of Beaufort. 2 *Atkins*, p. 190.

The bill is brought to be relieved against a judgment obtained at law on a bond in the penalty of 100*l.* and likewise excessive damages of forty pounds, and for a perpetual injunction.

A. D. 1741. The bill was for relief against a judgment on a bond, in which the plaintiff was jointly bound with his son, in the penalty of 100*l.* that the son should not commit any trespass in the Duke of Beaufort's royalty, by shooting, hunting, fishing, &c. except with the licence of the game-keeper, or in company with a qualified person; the son having catched two flounders with an angling rod, the bond was put in suit, and judgment for the penalty: the game-keeper's brother-in-law, and another servant of the duke's, asked the plaintiff's son to angle with them, when he catched the two flounders; and the verdict was found merely on their evidence. Lord Hardwicke decreed the plaintiff should be relieved against the verdict, and that the duke should refund the 100*l.* recovered on the bond, and the 40*l.* damages.

A. D. 1741. The plaintiff was jointly bound with his son in a bond in the penalty of 100*l.* that the son should not commit any trespass in the duke's royalty, by shooting, hunting, fishing, &c. unless with the licence of the game-keeper, or in company with a qualified person. The son afterwards having catched two flounders, with an angling-rod, in the duke's royalty, the bond was put in suit against the plaintiff, and judgment for the penalty. Two of the duke's servants, one of them brother-in-law to Marks the game-keeper, asked the son of the plaintiff to go with them, and divert himself with fishing, they angled about two hours, in a navigable river, and catched two flounders. The verdict was found by the Jury merely upon the evidence of these two servants. The plaintiff (his son being dead) has been obliged to pay the 100*l.* the 40*l.* costs of suit, though the value of the flounders was proved to be two-pence only. The bond was given in 1729, while the plaintiff was under a prosecution, and in custody before a justice of peace, at the information of Marks the game-keeper, for carrying a gun in the duke's manor, and for killing a dog belonging to the duke. It was not pretended that the plaintiff's son killed any game, but that he carried a gun only. Marks took him before a justice of peace that lived fifteen miles from the place, when there were several neighbouring justices within three miles. When the plaintiff's son was before the justice of peace, they threatened him with being entirely ruined by the duke, if he would not agree to give this bond. From the year 1729 till 1732, it does not appear that he ever was guilty of any trespass; and even after the two flounders were catched, which was in 1732, no manner of notice was taken of it till 1734, when an information for a riot having been tried at Winchester, (in which these very servants that decoyed the son into this fishing were convicted on the evidence of the plain-

iff in this cause,) immediately after the trial, the suit was commenced upon the bond.—*Lord Chancellor.* The first general question is, Whether the bond was obtained by oppression, and by the imposition of the Duke of Beaufort's servants? Secondly, Supposing there is an evidence of such imposition, whether the bond will be considered only as a security that the son should not poach for the future? Thirdly, Whether an ill use has been made of this bond? As to the first head of relief, oppression and imposition, I am of opinion there is no evidence of either which ought to induce the Court to relieve. The plaintiff's son appears to have been a person who made a practice of carrying a gun, and likewise was warned several times by Marks the game-keeper not to come into the duke's manor: afterwards Marks, being upon his lawful business, finds this young man, with a gun in his hand, and might have justified seizing the dog, and though he shot him, it does not make any great alteration, because, if any body has suffered, the duke has, who lost the benefit of the dog, which should have been secured to his own use. The carrying a gun and shooting the keeper's dog, in return for his own being killed, was a sufficient justification of Marks for taking the plaintiff's son before a justice of peace. As to the point of taking him before a justice of peace who lived at the distance of fifteen miles, it is not a thing to be commended, but, however, that does not prevent his having equal jurisdiction as if he had lived in the neighbourhood; it appears, besides, that the plaintiff's son had more assistance at Winchester than he would have had in any other part of the country, for he had the Recorder for his counsel, and it is very probable the game-keeper had an eye to having counsel himself, or he would not have thought of carrying him so far. No evidence has been attempted to be given of the justice of

A. D. 1741.

A. D. 1744.

An unqualified person shooting a game keeper's dog, will justify a judge in directing considerable damages.

peace misbehaving in the affair; on the contrary, he was so favourable as not to levy the penalty of five pounds, which the statute gives against a person carrying a gun, being unqualified; nor was there any notice taken of killing the duke's dog; and however trifling it may be called, if such a thing had come before me at Nisi Prius, on the insolent behaviour of the person at the time he shot the dog, and other circumstances, I should have made no scruple of directing very considerable damages. As counsel appear to have been present the whole time before the justice of peace, though it is not said they advised the bond, yet I must presume they did, as nothing is shewn to the contrary. Bonds taken for the preservation of the game, and to prevent poaching, are not only for the benefit of lords of manors, but even of the young persons who enter into them, as this sort of idleness generally leads them to worse consequences. As to oppression, if there had been any illegal advantage taken whilst he was in custody before the justice of peace, he might have been relieved at law, and there was no occasion for a suit in equity. But there could be none here, because his being before a justice of peace was lawful, nor was there any improper method used to draw him into the executing of this bond: in the common case of a warrant of attorney to confess judgment by a person in custody, if he has counsel present, it will not be set aside for duress, where the imprisonment was legal. Though there is no act of parliament which directs taking bonds in this particular case, yet there are statutes which approve of it in similar cases; as, for instance, the acts that relate to the customs, expressly direct and command such bonds to be taken, to prevent and guard against offences for the future. The act likewise against deer-stealing commands such bonds to be taken. Vid. 5 G. 1. c. 15.

The taking bonds to prevent poaching is for the benefit of the obligor, as this sort of idleness leads to worse consequences.

If a person in custody confesses a judgment, whilst his council is attending, it will not be set aside for duress.

There is no act of parliament which directs taking bonds in this particular case but the acts which relate to the customs, and the act against deer-

sect. 4. and though there is no authority in the present case, yet it shews the doing of it is not malum in se. The counsel for the plaintiff having insisted it is an excessive penalty, and to be sure it is a large one, but I do not know that courts of equity, where a bond is entered into voluntarily, have gone so far as to take into their consideration, the greatness or smallness of the penalty. I shall be extremely cautious how I give an opinion that will set aside such bonds, which, if rightly used, may be of great service in the preservation of the game, and an equal benefit to the obligors themselves, in taking them out of an idle course of life, which poaching naturally leads them into. As to the head of security: it is most absurd to think that bonds of this kind were intended merely as a security, and that nothing is to be recovered upon them. I am of opinion when these sort of bonds are given by way of stated damages between the parties, it is unreasonable to imagine they could only be intended as a bare security that the obligor should not offend for the future: Was this the case, in what respect is a gentleman in a better condition, who has such a bond, than he was before, if after he has obtained judgment at law, a court of equity will give him no other satisfaction than the bare value of the price of the game that is killed? These two heads of relief may therefore be laid out of the case.

A. D. 1741.

stealing directs such bonds, so that the doing of it is not malum in se.

These bonds are not intended as a bare security, that the obligor shall not offend for the future, but are by way of stated damages between the parties.

The third is the most material consideration, and that is the ill use which has been made of the bond. No evidence has been offered to shew that ever the plaintiff's son has been guilty of shooting, fishing, hunting, &c. from the time of the giving the bond in 1729, till May 1732, after this fact of catching the two flounders, which must be admitted to be a breach, it rests for two years, and no action was brought upon the bond; then it appears that the plaintiff here was a witness in an information for a riot tried at Winchester Assizes in Trinity

A. D. 1741. Term, 1734, where the duke's two servants were convicted, and chiefly on the plaintiff's evidence. It is a very material circumstance that the plaintiff's son had a licence, or at least an encouragement to fish, by being in company with two of the duke's servants, one of which was brother-in-law to Marks the game-keeper.

Where the motives to an action are unjust, though the cause of action was just, a court of equity will always take this into consideration, though they cannot at law.

It frequently happens there may be a just cause of action, yet the real motives may be very unjust, which a court of equity will always take into their consideration, though they cannot at law pay any regard to it. It appears by the evidence that Marks, who was the game-keeper, who had the authority of the duke, who has been a witness to the transaction of the bond, gave a licence, or at least an encouragement to this fishing, which, as it was with an angling-rod only, could not be called poaching, nor was it ever so esteemed. Besides, in such a tract of time as two years, it is impossible to suppose Marks, the game-keeper, could be ignorant of this fishing, especially as his own brother-in-law was in company. According to the condition of this bond, the plaintiff could not be relieved at law, because his son could not fish without express leave from the game-keeper, or in presence of a qualified person, so that if the Duke of Beaufort himself had given leave, there must at law have been a verdict, because it is not within the express terms of the condition of the bond. Now when a man has made this moderate use of his liberty of fishing, and manifestly appears to have had leave, it would be hard not to relieve against the judgment, and penalty recovered upon this bond at law. The next consideration will be, as to the costs in this court: though I am of opinion the money must be refunded, yet it would be too much to make the Duke of Beaufort pay costs, because he does not appear to me to have had the least knowledge of the circumstances of this case, being carried on merely by his agent; but if

Fishing with an angling-rod is not poaching, nor ever esteemed so.

Marks had been before the Court, I would have decreed costs against him in equity, but as he is not a party, I must decree for the plaintiff that he shall be relieved against this verdict, and that the duke shall refund the 100*l.* recovered upon the bond, and also the 40*l.* damages, but give no costs in this Court on either side. A. D. 1741.

Ward v. Creswell. Willes, p. 265.

To replevin for taking six boat-oars at Creswell Haven otherwise Creswell Boat Landing, in the parish of Woodhorn. There was an avowry that the locus in quo was the soil and freehold of the defendant, and that the goods were doing damage there, &c. The plaintiff pleaded in bar, First, That E. Cook was seised in fee of one moiety of the place, in which, &c. and that he gave the plaintiff license to lay and place the goods there, traversing that the locus in quo was the soil and freehold of the defendant; on which issue was taken and found for the defendant. Secondly, That the locus in quo for time immemorial hath been a certain piece of waste ground in the township of Creswell and parish of Woodhorn containing three acres lying contiguous to the sea, and that E. Cook was seised in fee of "certain ancient tenements consisting of divers messuages, and several, to wit, 200 acres of land with the appurtenances," and that he, and all those whose estate he has in the said tenements, with the appurtenances, have from time immemorial had and been accustomed to have for themselves, and their farmers and servants, common of fishery with two boats in the sea, there every year at all seasonable times of fishing in the year, as belonging and appertaining to the said tenements with the appurtenances, and to have for themselves, their farmers and servants, the liberty of landing and putting on shore their said fishing-boats on the place, in which, &c. for the necessary use of the said

The right of fishing in the sea is a right common to all the king's subjects, and therefore a prescription for such a right as annexed to certain tenements is bad. 16 Vin. Abr. 354. S. C.

A. D. 1741. common of fishery; that the plaintiff as the servant of E. Cook, and by his command at the time of taking, &c. being a seasonable time of fishing, with a boat fished in the sea there, using the said common of fishery there, and on that occasion at the same time of taking, &c. landed and put on shore the said fishing-boat, in and upon the place in which, &c. the said six boat-oars then being in the said boat, and part of the tackle and furniture there, &c. whereupon the defendant of his own wrong took the said boat-oars, &c. There was a third plea in bar, similar to the second, except that instead of claiming the right of fishery with two boats the right was claimed generally "with their boats." To the two last pleas there were general demurrers. After two arguments at the bar, the first by *Draper*, Sergeant, for the defendant, and *Bootle*, Sergeant, for the plaintiff on the 21st of November 1738, and the other by Burnett, Sergeant, for the former and *Prime*, King's Sergeant, for the latter on the 16th of June 1740, the judgment of the Court was delivered, as follows, by *Willes*, Lord Chief Justice. "It was said by the counsel for the defendant, and not contradicted by the counsel for the plaintiff, that there has been a verdict for the defendant on the first plea; so it comes before the Court only upon the demurrer to the second and third pleas. To the second plea it was objected, First, That the prescription was too general and uncertain, being laid to be appurtenant to "certain ancient tenements consisting of divers messuages and several, to wit, two hundred acres of land. Secondly, That the prescription was void, because the plaintiff insists on his right as a particular right of common appurtenant to certain tenements, whereas it is a general right for every subject of England to fish in the sea of common right. Thirdly, That the plaintiff had not brought his case

within the prescription; he not having averred that the boat in question was necessary for the enjoyment of his common of fishery, or that it was necessary for that purpose to land it on the place in question. To the third plea the same objections were taken, and two more, First, That the prescription was not laid for any certain number of boats, and therefore void. Secondly, That the prescription is to fish with their boats, and that the plaintiff has not said whose the boat in question was. We think that there is something in most of these objections: but as we are all clearly of opinion that the second objection, which goes to both pleas, is unanswerable, I shall say the less upon the rest. The first objection likewise goes to both pleas. It consists of two parts; it is objected, 1st, That "tenements" is too general a word; and, 2dly, That the prescription is only claimed in respect of certain ancient tenements, &c. without saying how many, or whether it be claimed for all or for each of them, and it cannot be claimed jointly for several. It is said, that the word "tenements" is too uncertain, unless ascertained by other words, as the messuage or tenement called The Black Swan, &c.; but we do not rely upon that. The other part of this objection seems to be fatal. In Basket v. Lord Mordant, Dyer, 164. a. and Bendl. 74. it was ruled that if a man, having common in a waste for one hundred sheep as appurtenant to a house and certain acres of land, purchase another messuage with certain lands, which also has common in the same waste for other one hundred sheep as appurtenant, he cannot make title in pleading by prescription in the entire for common appurtenant to both houses and lands together for two hundred sheep, but must make two several titles and prescriptions for the two hundred sheep. The same doctrine is laid down in Palmer, 362. The third objection, which also applies to both the pleas, seems to

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A. D. 1711. be fatal. We think it is sufficiently set forth that the boat was necessary for fishing, but it is not sufficiently shewn that it was necessary to land it on the defendant's land *(a)*. The first objection to the third plea appears to have but little weight; for if a man have a right to fish, he may fish with as many boats as he pleases. But the second objection to the third plea seems to be of weight, that the plaintiff should have shewn that it was a boat of E. Cook, or his farmer or servant; the prescription confining it to their boats in this plea. But we are all clearly of opinion on the second objection, which equally applies to both pleas, that the prescription is void, because the right claimed as annexed to certain tenements is a general right for all the subjects of the kingdom *(b)*. In Pell v. Towers, Noy. 20. it was agreed "that a man shall not prescribe in that which the law of common right gives." So in Bro. Abr. title "Prescription" pl. 71. Now "every man may fish in the sea of common right," 8 Edw. 4. 19. a. In Warren, v. Matthews, 6 Mod. 73. and Salk. 357. it was holden that "every subject of common right may fish with lawful nets in a navigable river as well as in the sea." So is 1 Mod. 105. And this is not merely the law of this country, but is also the law of nations. Grot. de Jure Belli et Pacis, b. 2. c. 3. s. 9. And Bracton, l. 1. c. 12. s. 6. says Publica vero sunt omnia flumina et portus: Ideoque jus piscandi omnibus commune est in portu et in fluminibus. This prescription therefore for a right common to all the subjects of the realm cannot be supported. A man might as well prescribe that he and all those whose estate he has have a right to travel on the king's highway as appurtenant to his estate. For these reasons, as the defendant has had

(a) See Peppin v. Shakespear, 6 Durns. and East, 648.

(b) See Carter v. Murcot, 4 Burr. 2163. And the Mayor, &c. of Lynn v. Turner, 4 D. and E. 437, and 2 H. Bl. Rep. 182.

a verdict for him on the first plea, and as we are of opinion that the plaintiffs second and third pleas in bar are both bad, judgment must be for the defendant." A. D. 1742.

The Lord Mayor and Aldermen of York v. Sir Lionel Pilkington and others. 9 *Mod. Rep. p.* 273.

The plaintiffs brought their bill against the defendants for an exclusive right to fish in the River Ouse in Yorkshire, and to be quieted in the possession of such fishery, to prevent multiplicity of actions. The defendants by answer insist, that they are lords of several manors, and of very large estates along the banks of the River Ouse, and that they have always used to fish in such parts of the river as are contiguous to their land. The plaintiffs, pending this suit, indicted several persons in the Court of Sessions for the city of York, for fishing in the river under an authority from the defendants. The defendants now moved for an injunction to stay proceedings upon these indictments, upon an affidavit that the mayor and aldermen, who are plaintiffs in the cause, are in the commission of the peace for the city of York, and consequently would be judges in their own case.—Mr. Attorney-general opposed the motion by denying the jurisdiction of this Court to stay proceedings in pleas of the Crown, although the question depends upon a matter of right which is submitted to the determination of this Court.—Mr. *Brown* replied, that it was very extraordinary that the plaintiffs, who come to establish their exclusive right of fishing by bill in this Court, should, when the thing is ripe for hearing, take this other method of proceeding by indictment, which in some measure will try the very right; for the defendants to such indictments cannot be guilty of the trespass, if the persons who authorized them had a right to fish. Besides, as they have brought their bill in this Court, and have submitted their title, they

The plaintiffs claiming an exclusive right of fishery, brought their bill to be quieted in the possession of it, and to prevent multiplicity of actions. The defendants by answer insist on a custom they have of fishing on the borders of their land. Pending the suit, plaintiffs indict several persons in the Court of Sessions for the city of York for fishing under an authority from defendants. And now, upon affidavit that the mayor and aldermen, plaintiffs, are in commission of the peace for York, and consequently would be judges of their own

A. D. 1742 case, defendants moved for an injunction to stay proceedings on these indictments. —Lord Chancellor. Though this Court cannot grant an injunction to stay a criminal proceeding at the suit of the Crown, so as to restrain the Attorney-general, yet as this is an indictment for trespass in which was no violence, and is to try a civil right, which is the subject of an action, it can order the prosecutor, who is plaintiff now before the Court, not to proceed. S. C. 1 Atk. 282.

have concluded themselves from proceeding in any other Court or method; and if they do, this Court will grant an injunction. —*Hardwicke*, Lord Chancellor. Where criminal proceedings relate to matters left to the determination of this Court, I should not hesitate to stay proceedings; and this Court has often done it. An information was brought in the name of the Attorney-general, in order to settle a right in a highway; and upon motion, there was an order of this Court to stay the proceedings in an indictment for a repair of the highway in the sessions until such information was determined in this Court. Suppose a right to the boundaries of a manor was disputed in this Court, and there was an injunction to stay proceedings in an action of trespass, and the party should change his action of trespass to an indictment of trespass, I should have no scruple to stay his proceeding. His lordship was now obliged to go to the house of lords, and ordered this motion to stand over until the next day, when he spoke to this effect: The defendants in this cause had another method of gaining what they attempt by this motion. If they had gone to the Attorney-general, and had shewed him, that the indictment was not for any violence or breach of the peace, but was the dispute of a civil right, and the proper subject of an action of trespass to try that right, he to be sure would have granted a cessit processus or nolle prosequi almost of course, especially where one of the parties whose right was involved in the substance of the indictment was to be judge of the indictment. But as the parties have prayed for their remedy in this Court by motion, we must see how far we can assist them. This proceeding of the plaintiffs by way of indictment is improper upon two accounts: In the first place, they are making themselves their own judges; and in the second, they are in some measure going to the decision of a right which they themselves have submitted to the

decree of this Court. Besides, as the prayer of the plaintiff's bill is to prevent multiplicity of actions, they are acting quite inconsistently with what they pray; and the question will be, Whether this Court can stay these proceedings, which are not actions in the name of the party, but a prosecution in the name of the king for a breach of the peace? And to be sure this Court has not such a general jurisdiction as to grant injunctions to stay criminal proceedings which are at the suit of the Crown, for the Attorney-general may still proceed. But where a matter of property is laid before this Court for its judgment, and the plaintiff in the cause indicts the defendant for a trespass upon the land, without any violence or breach of the peace, which trespass might now properly be the subject of an action, it being attended with no marks of violence, and is to try a civil right; there the Court, though it cannot grant a formal injunction to close the hands of the Attorney-general, yet it can and will make an order on the prosecutor, who is party to a bill in this Court, not to prosecute: and that is the very case before the Court; for it is sworn, that the indictment found at the sessions is merely for fishing, without any circumstances of misbehaviour which tend to a breach of the peace; and the question upon such indictment can only be upon the civil right, which is the subject of an action, and is already before this Court, which will make an order on the prosecutor, who is a party to a suit for the same thing in this Court, not to proceed on the indictment until his right is at a period in this Court. As suppose a bill here to settle the right of lands, and there are several entries, and indictments brought by some of the parties for those forcible entries, which indictment is a remedy by act of parliament for breach of the peace, and also a civil remedy for the benefit of the party, yet the Court will stay the party from proceeding in this

A. D. 1742.

A. D. 1712. indictment for his own benefit until his right to the lands in the bill is determined in this Court. Therefore let there be an order on the plaintiff to stay him from prosecuting the defendants or their agents, either by way of action or indictment, for exercising the right of fishing claimed by the defendants in their answer, until the hearing of the cause or further order.

Lord Tenham v. Herbert. 2 Atkins, p. 483.

The defendant demurred to the plaintiff's bill, brought to establish a right to an oyster fishery, and to be quieted in the possession of it, as being a matter properly triable at law.—Lord Hardwicke declared, that where the right of a fishery is in dispute only between two lords of manors, they can neither come here, till it is first tried at law, and therefore allowed the demurrer. Where a man sets up an exclusive right, and the persons who controvert it are numerous, and he cannot by one action at law

The plaintiff brought his bill, in order to establish a right to an oyster fishery, and to be quieted in the possession of it against the defendant Herbert, who claims the piece of ground where this fishery is, as belonging to his manor. The defendant demurred to this bill, as it is a matter properly triable at law.—*Lord Chancellor.* Undoubtedly there are some cases, in which a man may, by a bill of this kind, come into this Court first; and there are others where he ought first to establish his right at law. It is certain where a man sets up a general exclusive right, and where the persons who controvert it with him are very numerous, and he cannot, by one or two actions at law, quiet that right, he may come into this Court first, which is called a bill of peace, and the Court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant. As to the case of the corporation of York, and Sir Lionel Pilkington, the plaintiffs there were in possession of the right of fishing upon the river Ouze, for nine miles together, and had constantly exercised that right; and as this large jurisdiction entangled them with different lords of manors, it would have been endless for the corporation to have brought actions at

law. But where a question about a right of fishery, is only between two lords of manors, neither of them can come into this Court till the right is first tried at law. Lord Tenham does not charge in this case any possession for the last 38 years, so that this is in the nature of an ejectment bill; the plaintiff says, that this piece of ground aquâ cooperta belongs to him; Mr. Herbert insists, it belongs to him; so that this may very properly be determined at law, as it is a mere single question, to try the right between two persons; and it is not like the case of the corporation of York, who must have gone all round the compass to have come at their right at law. Therefore the demurrer must be allowed.

A. D. 1742.

quiet that right, he may come here first, which is called a bill of peace, and the Court will direct an issue to determine the right, as between lords of manors and their tenants, or tenants of one manor and another.

Coulson v. White. 3 *Atkins*, p. 21.

A. D. 1743.

Lord Chancellor. Every common trespass is not a foundation for an injunction in this Court, where it is only contingent, and temporary; but if it continues so long as to become a nuisance, in such a case the Court will interfere and grant an injunction to restrain the person from committing it.

This Court will not grant an injunction to restrain a person from committing a trespass, where it is temporary only; otherwise, where it has continued so long as to become a nuisance.

Jervois v. Hall. 1 *Wilson*, p. 17.

Qui tam upon the Game Act for killing a hare, verdict for defendant; motion for a new trial, because the Judge who tried the cause refused to admit a person to be a witness, who was a parishioner of the same parish where the hare was killed; but C. J. *Lee*, said, he did not remember that ever a new trial had been granted in the case of a penal action; and so per Cur', the motion was refused.

No new trial in a penal action.

Mallock v. Eastly. 7 *Mod.* p. 482.

A. D. 1744.

"Rawlin Mallock, Esq. who sues as well for the poor of the parish of Paington, in the county of Devon, as for himself, on the 24th day of August, in the seven-

The lord of a manor, worth one hundred and twenty

A. D. 1744. pounds a year, the demesnes of which are granted to another for life, is not thereby qualified to kill game within the 22 and 23 Car. 2. c. 25 for the words "having an estate, &c." signify an estate in possession And quære, Whether he is entitled to kill game on the manor, although he be lord of it, unless he be "an esquire or other person of higher degree," according to the statute.—S. C. but not S. P. 3 Salk. 291. 3 Lev. 227. Cro. Jac. 195 Cro. Car. 553 7 Co. 17.

teenth year of our now lord the king, exhibited to the justices of our said now lord the king of the bench here (to wit) at Westminster, his certain bill against Charles Eastly, gentleman, one of the attornies of the court of our said lord the king of the bench here present here in court, in his own proper person complaining of the said Charles Eastly of a plea, that he render to the said Rawlin, and to the poor of the said parish, the sum of ten pounds of lawful money of Great Britain, which he owes to, and unjustly detains from the poor of the said parish, and him the said Rawlin; for that the said Charles, not being a person qualified according to the law to kill the game, on the thirteenth day of October, in the seventeenth year of the reign of our now said lord the king, in the parish aforesaid, in the county aforesaid, had kept and used a certain gun, being an engine to kill and destroy the game, and which gun he the said Charles had kept and used for the intent and purpose of destroying the game, contrary to the form of the statutes in that case made and provided, whereby an action accrued to the said Rawlin, who as well, &c. to demand and have of the said Charles five pounds, parcel of the said ten pounds. And also, for that the said Charles not being a person qualified according to the law to kill the game, afterwards (to wit), on the fourteenth day of October, in the seventeenth year aforesaid, at the parish aforesaid, in the county aforesaid, had kept and used a certain other gun, being an engine to kill and destroy the game, and with the said gun did then and there destroy one pheasant, contrary to the form of the statutes in those cases made and provided, whereby an action accrued to the said Rawlin, who as well, &c. to demand and have of the said Charles another sum of five pounds, residue of the said sum of ten pounds." To which the said Charles pleaded, "that he did not owe to the said Rawlin, who as well, &c.

the said ten pounds, or any part thereof; and of this he puts himself upon the country. And the said Rawlin, who as well, &c. likewise." Upon trial of the said issue so joined, it appeared that the defendant, at the several times when, &c. was seised in fee-simple of the moiety of the manor of Daccombe with the appurtenants; the demesnes of which moiety of the said manor, if they were in possession, were worth one hundred and twenty pounds a year; but at the several times when, &c. all the demesnes of the said manor were leased out to several tenants for ninety-nine years, determinable on the death of one, two, or three persons, under certain yearly reserved rents, amounting in the whole to fifteen pounds thirteen shillings a-year. That the said Charles was also seised in right of his wife of other lands of inheritance, to the yearly value of thirty pounds, and of other lands in reversion, expectant on the death of his wife's mother, of the yearly value of fourteen pounds. Whereupon a verdict was given for the plaintiff upon the second count in the declaration, for five pounds, parcel of the said debt of ten pounds, for killing a pheasant out of the defendant's manor. And as to the residue for the defendant. The question in law was, Whether the defendant's being so seised of the said manor, lands, and tenements as above, be a qualification?—Serjeant *Belfield*, for the plaintiff. The present question depends upon several acts of parliament. The first Statute is the 22 and 23 Car. 2. c. 25. s. 3. which enacts, "that all and every person and persons not having lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the clear yearly value of one hundred pounds a-year, or for term of life, or having lease or leases of ninety-nine years, or for any longer term of the clear yearly value of one hundred and fifty pounds, other than the son and heir apparent of an esquire or other person of A. D. 1741.

A. D. 1714. higher degree (*a*). And the owners and keepers of forests, &c. are hereby declared to be persons by the law of this realm not allowed to have or keep for themselves or any other person or persons any guns, &c. or other engines aforesaid, but shall be, and are hereby prohibited to have, keep, or use the same." There are, however, some anterior statutes for the preservation of the game. The 25 Hen. 8. c. 11. s. 5. is a statute to prevent the killing of wild fowls at improper seasons, with this proviso, "That it shall be lawful for any gentleman or any other that may dispend forty shillings by the year of freehold, to hunt and take such wild fowl with their spaniels only, without using any net or other engines for the same, except it be a long bow or long bows." The Statute of the 7 Jac. 1. c. 11. s. 7. made perpetual by the 7 Car. 1. c. is made for the preservation of pheasants and partridges, and qualifies persons to kill them "which have or shall have free-warren, or shall be lord of a manor or freeholder, who is or shall be seised in his own right, or in the right of his wife, of lands, tenements, or hereditaments to the clear yearly value of forty pounds, or more, by the year, over and above all charges, and reprises of some estate of inheritance or of lands, &c. in his own right, or in right of his wife, for term of life or lives, of the yearly value of eighty pounds, over and above all charges and reprises, or who shall be worth in goods or chattels four hundred pounds, by him or themselves, or by his or their menial or houshold servants sufficiently authorised from their masters, to take pheasants or partridges in the day time only, in and upon their own or their masters free-warren, manor, and freehold, or any part of them." I mention these statutes to shew the proportion that is carried on from time to time with respect to the revenues of persons intended to be quali-

(*a*) See Jones v. Smart, 1 Term Rep. 44.

fied. The defendant has not sufficient yearly revenues A. D. 1744.
to be qualified to kill the game. All the lands claimed to qualify him, exclusive of the reversion in the moiety of the manor and demesnes of Daccombe, are not enough to make up a qualification: so the single question is, Whether or no a reversion expectant upon a lease or leases for ninety-nine years, determinable on one, two or three persons dying, is to be considered as having of "lands, tenements, or hereditaments," within the said Statute of Charles the Second, so as to qualify the reversioner to kill game, his real yearly income being under one hundred pounds a-year, till the reversion falls into possession? It appears from the several statutes mentioned, that a revenue to give a qualification must not be one in expectancy, but a present revenue or income in possession. The Statute of 25 Hen. 8. says, that the "person qualified must be able to dispend forty shillings a-year." And the two Statutes in James the First's time say, "that the estate must be of the clear yearly value," which being in the present tense must mean lands in possession. Lands, and the reversion of lands, are two distinct things: one man may have lands, of which another man may have the reversion: the statutes clearly intended, that the qualifications of persons should be agreeable to the income they have in possession. The reason why the legislature restrained the power of killing the game to particular incomes was, that persons who could not spend so much yearly for their families might not lose their time and neglect their business in the idle diversion of sporting and shooting the game.—Mr. Serjeant *Eyre*, for the defendant. There is only one question stated at the foot of the case; yet I will consider it upon two views.

The First, Whether the defendant, as lord of a manor simply, without any regard to his yearly revenue, is not qualified to kill game?

A. D. 1744. The other. Whether the defendant's estate, as appears in the case, be not a qualification?

As to the first, Every lord of a manor is qualified to kill game. The proprietors of manors generally were barons, and the manor itself composed of demesnes and courts baron. At present, indeed, several persons have manors without any lands, the demesnes having been sold and disannexed; but the property of a manor dismembered of its rents and revenues is still considered as a royalty or jurisdiction so favoured as to entitle its master to many privileges, and among the rest that of killing of game. With manors the Crown usually granted free-warrens; and though many statutes have been made to preserve the game, under severe penalties, yet lords of manors have been always considered as privileged persons, and qualified to destroy game. The first act of parliament which takes notice of lords of manors is the 1 Jac. 1. c. 27. s. 6. and that statute recites, "That the game was outrageously destroyed, especially by the vulgar sort of men of small worth, who were not able to pay the penalties;" and enacts, "that it shall be lawful to and for every lord of a manor to keep pheasants and partridges, &c." The second Statute is the 7 Jac. 1. sect. 11. to the same purpose as the 1 Jac. 1.; and both these statutes are made perpetual by a Statute in the 17 Car. 1. The next Statute is the 22 and 23 Car. 2. c. 25. which recites, "That divers disorderly persons, leaving their lawful trades and employments, betake themselves to the destroying of the game with guns, &c. to the prejudice of gentlemen, noblemen, and lords of manors;" for remedy whereof it enacts, "that all lords of manors or other royalties not under the degree of an esquire may, by writings under their hands and seals, authorize one or more gamekeepers within their royalties or manors, who so authorized may seize all guns, &c. for the killing of

game within the precincts of such manors, as shall be used by any persons who are by that statute prohibited to use the same: and such gamekeepers may search houses in the day-time, by a warrant from a justice of peace, and seize guns, &c. to the use of the lord of such manor where they shall be found, or otherwise cut them to pieces, or destroy them." If by this statute lords of manors may authorize gamekeepers to kill game and to seize guns, &c. it will be absurd to say, that the lord of the manor has not such power himself, for it would be degrading him below the privileges of his servant. And why does the statute authorize them to make gamekeepers to preserve the game, unless they themselves had an interest in it, and power to take and destroy it, and seize the guns, &c. of unqualified persons? Yet it is clear and settled, that they may carry guns and kill game within their respective manors. But it may be objected, that no lord of a manor can make a game-keeper, unless such lord of a manor himself be of the degree of an esquire. The import of this word esquire is very indefinite. The origin of the name and dignity is very antient and dark. Formerly they were only esquires who had jus scuti, or entitled to bear their arms in a shield; but now almost every body are esquires. In the case of Carpenter v. Adams (*a*) it was determined, that nobody but the lord or lady of a manor can make a deputy to kill game; and if his servant can do it, he himself must be empowered to do it by virtue of his own inherent right. If the lord of a manor kill game out of his manor, he is liable to an action of trespass, but not liable to the penalty of the statute which is now sued for. All the treatises upon the game laws mention lords of manors to be qualified to kill game; and as the present is a penal law, and made for the benefit of lords of manors, it must be

A. D. 1744.

(*a*) Comb. 183.

A. D. 1714. expounded beneficially for the defendant. The actual possession of an estate is not the only qualification mentioned in the statute, since that is dispensed with in the case of the eldest son of an esquire, or of any person of higher degree, who are qualified to kill the game, although not worth one farthing.

As to the other question, he submitted it, that the defendant may be said to have an estate of inheritance to the value of one hundred pounds a-year. He has some in possession, and the rest in reversion after the determination of an estate for years. A reversion is a tenement and hereditament in notion of law, and therefore within the express words of the Statute of the 22 and 23 Car. 2. and in the case of pleading a reversion after a term for years, he must alledge that he is seised of it in his demesne of fee; here is no estate of freehold intervening, but only an estate for years; and in law, the possession of the lessee for years is the possession of the reversioner.—*Willes*, Chief Justice. If the defendant is not qualified, as being lord of a manor, he certainly is not by his estate within the Statute of the 22 and 23 Car. 2. c. 25. s. 3. neither within the words or meaning of it. The words are, "having an estate;" and a man cannot be said to have an estate when another is in possession of it, and he himself only a nude reversion, or at least not attended with rents sufficient to make up his other yearly income a qualifying estate; and it would be a strong thing to say, that a man entitled to a bare reversion of a thousand pounds yearly value after the expiration of a thousand years, should be said to be qualified within this act to kill game. But the next words are stronger, "of the clear yearly value;" which must mean payable to him who is intended to be qualified. But this case is less within the meaning of the statute; for it appears from the former acts, and the Statute of Charles the Second,

and the meaning of them, the persons not having sufficient incomes to maintain themselves and families (and therefore the statute fixes the income) should not destroy their time in these idle diversions or occupations of killing the game. If then reversions or remainders were to be qualifications, a hundred people might be qualified by one and the same estate, by limiting remainders properly one after another. Suppose a man has a hundred pounds a-year, and owes as much as it is worth, by the construction contended for, he may sell his estate, and still preserve his qualification, for he may sell it for a thousand years; and if the reversion is a qualification, he is still qualified, though a beggar (*a*). But I have some doubt whether the defendant, as lord of a manor, simply, is not qualified to kill game within his own manor. Though the Statute of Charles the Second empowers all lords of manors not under the degree of "esquire" to empower gamekeepers to prevent the game, &c. and the present defendant is only styled "gentleman" upon record, yet that will be no obstruction to his qualification, because the subsequent statutes speak of "lords and ladies of manors" without confining them to any degree of gentility; and a lady of a manor cannot bear the title required by the Statute of Charles the Second; so that at present a lord of a manor may, I think, make game-keepers, though under the degree of an esquire. It seems a little odd, that the servant of the lord of a manor may kill game, and yet the lord himself not do it without being punished by a penalty (*b*). A. D. 1744.

(*a*) An equitable as well as legal estate gives a qualification; but the estate, of whatever kind it may be, must be of the value required, clear of all mortgages or incumbrances created by the owner, or those under whom he claims. Whetherall v. Hall, Cald. 230.—See also Lowndes v. Lewis, Cald. 188. that a life-estate of less than 150*l.* a-year is not a qualification to kill game.

(*b*) It is determined, that "an esquire" or other person of higher degree, as such, is not qualified under the 22 and 23 Car. 2. c. 25. though the son of an esquire or the son of other person of higher degree is. Jones v. Smart, 1 Term Rep. 44.

A. D. 1744. —*Abney*, Justice. In Cay's Abridgement of this Statute of Charles the Second the word "clear" is omitted. The case will depend upon the construction of three acts of parliament. The first is, the 22 and 23 Car. 2. c. 25. sect 3. ; the second is, the 9 Anne, c. 3. ; and the third, the 8 Geo. 1. c. 19. The qualification is to be considered upon the first, and is the question of the present case; the penalty sued for is given by the second; and the action upon the last. At present, I think there are three qualifications in force, one of which every man must have to be entitled to kill game. The first is, of lords of manors, who have not a general qualification to kill game every where, but are stinted, and confined to the precincts of their own manors ; so that it will be considered whether the defendant has not incurred the penalty, as the case states that he killed the pheasant out of his manor : the second sort of persons so qualified to kill game are persons who have titles, as esquires, &c. the eldest sons of esquires, and of all superior titles ; and these are qualified to kill game, whether they are possessed of lands or not, and although they are not freeholders : the third sort of persons qualified to kill game are persons having estates ; and I am quite satisfied that the estate of the defendant will not qualify him. This very point was expressly determined in the King's Bench upon a very great debate some years ago, where a young gentleman in Essex, who had ninety pounds a-year in possession and one hundred in fifty pounds in reversion, expectant on the death of his mother, was yet held not to be qualified.—*Burnett*, Justice, was clear, that the estate was not qualification, but had some doubt as to the other point ; for though he imagined that the lord of a manor is entitled to kill game within his manor as well as his gamekeeper, yet he thought he would be liable to the penalty, if he used a gun to destroy game out of the boundaries of his manor. And here it is expressly found, that he killed

the pheasant out of his manor.—All the Court agreed, that the mere having a gun was no offence within the game laws, for a man may keep a gun for the defence of his house and family, but the party must use the gun to kill game before he can incur any penalty; and they said, this point was settled and determined (*a*). Adjourned as to one point only. A. D. 1744.

(*a*) This point was settled in Trinity Term, 11 Geo. 2. Rex v. Gardner, 2 Stra. 1093. 14 Viner. Abr. 3.—See also upon this subject Rex v. Filer, 1 Stra. 496. Wingfield v. Stratford, Sayer, 15. S. C. 1 Wils. 315. Rex v. Hunt, Dougl. 683. notis. Avery v. Hole, Cowp. 825. Rex v. Hartley, Cald. 175. Rex v. Thomson, 2 Term Rep. 18.

Howell v. James. 1 *Wilson, p.* 163. A. D. 1747.

Information for killing a hare amended.

This is a rule to shew cause why the plaintiff should not have leave to amend his information against the defendant for killing a hare, by altering the parish where the same is laid to be done. Mr. *Evans*, on shewing cause, objected, that there might be a conviction before the justices for the same fact already, in the parish where the informer wants to lay it; but it was answered by Mr. *Phillips* for the plaintiff, nothing of that appears to the Court, and it is now three months since the fact was done, and if we cannot amend it, the defendant will escape the prosecution; and this is like the case of the Duchess of Marlborough v. Whitmore, where the Court allowed the plaintiff to amend in an extraordinary case, which if the Court had not done, the Statute of Limitations would have run, and the plaintiff have lost all remedy. And the rule now was made absolute to amend the information.

Law v. Worral. 1 *Wilson, p.* 177.

Costs for the defendant, for want of a replication, on an information for killing game.

Information on the Stat. 8 Geo. 1. for killing game; the defendant pleaded a conviction before a justice of peace for the same fact, and the defendant had judgment for want of a replication, and obtained a side-bar-rule for costs, which Mr. *Evans* now moved to set aside, alledging that the statute did not give the defendant

A. D. 1747. costs, and that the Stat. 18 Eliz. does not extend to the subsequent statutes. But per Cur'. The words of the Stat. 18 Eliz. c. 5. are as general as any statute relating to costs, and seem to extend to every informer upon any penal statute who shall delay his suit, discontinue, be nonsuit, or shall have the matter pass against him by verdict or judgment, such informer shall pay costs; and there have been a great number of cases like this, where costs have been given; and cited Carter qui tam v. Tooting, Mich. 12 Geo. 1.

A. D. 1752. *Wingfield v. Stratford & al'. B. R. 1 Wils. R. p. 315.*

A gun is not an engine to kill game. Sayer, 15. S. C.

Trover for a gun; the defendants plead that the plaintiff kept the gun to kill game, and not being qualified, they justify (as game-keeper and servants to J. S. lord of the manor,) the taking away the gun from the plaintiff; but the plea doth not alledge that the plaintiff was out sporting with the gun, nor where the gun was taken; plaintiff demurs. And the Court held that a gun is not necessarily to be taken to be an engine to kill game, as it does not appear upon this record that the plaintiff killed game with it; he might use it to shoot crows, or destroy vermin; and it is not like nets and pointers, and such dogs, which can only be kept for killing the game. Judgment for the plaintiff. Vide 2 Stra. 1098.

Watson v. Jackson, B. R. 1 Wilson's Rep. p. 325.

Judgment as in case of a nonsuit against an informer qui tam upon the game law. Sayer, 22. S. C.

This was an action qui tam by a common informer upon the statute for killing game. Mr. *Clayton* moved for judgment as in case of a nonsuit, and obtained a rule for the informer to shew cause this term; no cause being now shewn, the rule was made absolute.

Jones v. Bishop. Sayer's Rep. p. 64.

In an action

Upon a motion in arrest of judgment, it appeared that the action was for the penalty of five pounds given

by the 9 Ann. c. 25. for exposing a hare to sale; and that the allegation in the declaration was, that the defendant, not being a person qualified in his own right to kill game, nor being entitled thereto, under any person so qualified, had a hare in his possession. The question was, whether this be a sufficient allegation of the offence for which the penalty is given? It was holden that it is.—And by *Lee*, Ch. J. It has been said; that although evidence of the defendant's having had a hare in his possession, would have been evidence of his exposing a hare to sale; yet as the offence created by the statute is exposing a hare to sale, it ought to have been alledged that the defendant did expose a hare to sale: but we are of opinion, that the allegation is sufficient; it being enacted by the second paragraph of that of the statute, "that if a hare shall be found in the possession of any person whatsoever, not qualified to kill game in his own right, nor entitled thereto under some person so qualified, the same shall be adjudged, deemed and taken to be an exposing thereof to sale, within the true intent and meaning of this act."

A. D. 1752. for exposing a hare to sale, it is sufficient to to alledge, that the defendant had a hare in his possession.

Fitch v. Nunn. Barne' Rep. p. 466. A. D. 1754.

This was an action brought on one of the penal statutes made to preserve the game, wherein defendant obtained a verdict; plaintiff moved for a new trial, and the Judge before whom the cause was tried reported the verdict to be contrary to evidence. Notwithstanding which, the rule to shew cause why a new trial should not be had, on payment of costs, was discharged; because no instance could be shewn where in an action on a penal statute, in which a verdict was found for defendant, a new trial had ever been granted. *Willes* and *Agar* for plaintiff; *Wynne* for defendant.

Kearle v. Boulter. Sayer's Rep. p. 191. A. D. 1755.

In an action, brought for the penalty given by the A poulterer

A. D. 1755. is not liable to a penalty, for having a hare in his custody.

5 Ann. c. 14. it was found by a special verdict, that the defendant carried on the trade of a poulterer; that for the carrying on of this trade he kept an open shop, wherein he bought and sold geese, chickens, and other poultry; that he had a hare in his custody, and did sell the hare to J. S. for four shillings; and that at the time of having the hare in his custody, and of selling it, he was seised in fee of an estate of one hundred pounds a year. The question was, whether the plaintiff ought to recover? It was holden upon great consideration that he ought not.—And by *Ryder*, Ch. J. By that clause of the 5 Ann. c. 14. upon which the present action is founded, it is enacted, "that if any higler, chapman, carrier, inn-keeper, victualler or alehouse-keeper, shall have in his custody or possession any hare, pheasant, partridge, moor, heath game or grouse, or shall buy, sell or offer to sale any hare, pheasant, partridge, moor, heath game or grouse, every such higler, chapman, inn-keeper, victualler, alehouse-keeper, or carrier, unless such game in the hands of such carrier be sent him by a person qualified to kill the game, shall forfeit for every hare, pheasant, partridge, moor, heath game or grouse, the sum of five pounds." It has been said; that every person, who buys and sells goods in an open shop, is a trader; and that every trader is a chapman; for that the German word copeman, from which the English word chapman is derived, does signify a trader: but we are of opinion; that although the defendant be a chapman in the large sense of the word, he is not a chapman within the meaning of the 5 Ann. c. 14. In order to come at the meaning of a word contained in a statute, the mischief intended to be remedied by the statute ought to be taken in consideration. It appears from the preamble of the 5 Ann. c. 14. that the mischief, intended to be thereby reme-

died, was the buying or receiving of game from loose idle persons. In order to remedy this mischief, innkeepers, victuallers and alehouse-keepers are prohibited from having game in their custody or possession; because it is probable, that these persons will frequently buy or receive game from loose idle persons, in order to have money spent at the eating thereof in their houses. Higlers and carriers are likewise prohibited from having game in their custody or possession; because it is probable, that these persons will frequently buy or receive game from loose idle persons in one place, in order to sell it at another. Chapmen are likewise prohibited from having game in their custody or possession: but the sound construction seems to be, that the word chapman in this statute, and the rather, because it is inserted betwixt the words higler and carrier, does only mean a trader who trades from place to place. It being as probable, that such traders will frequently buy or receive game from loose idle persons in one place, in order to sell it at another, as that higlers and carriers will. It was reasonable to prohibit such traders from having game in their possession: but it never could be the intention of the legislature, to prohibit every trader from having game in his custody or possession. It has been said, that, although the opinion of the Court shall be, that the defendant is a chapman within the meaning of the 5 Ann. c. 14. yet the plaintiff ought not to have judgment; because the jurors, whose province it was to determine, whether the defendant be such a chapman, have only found facts, and have not found expressly that he is. But as the question, whether the defendant be a chapman within the meaning of that statute, does in a great measure depend upon the construction of the statute, we are of opinion, that it is a question proper for the determination of the Court; and that the facts found by the ver- A. D. 1755.

A. D. 1755. dict are sufficient to enable the Court to determine the question. In the case of Dodsworth v. Anderson, 2 Jo. 142. it was holden, that if the proper facts are found by a verdict, it is the province of the Court to determine whether a person be a bankrupt within the meaning of any statute. It was said, that although the opinion of the Court shall be, that the defendant is a chapman within the meaning of the 5 Ann. c. 14. and likewise, that the question, whether the defendant be such a chapman, is proper for the determination of the Court, yet the plaintiff ought not to have judgment: because it is found by the verdict, that the defendant, at the time of having a hare in his custody, and of selling the hare, was seised in fee of an estate of one hundred pounds a year; and it was inferred, that it would be strange to hold, that a person, who is by law qualified to kill all kinds of game, is liable to a penalty for having a hare in his custody, or for selling a hare. No opinion was given by the Court upon this point.

A. D. 1756. *The King v. Maurice Jarvis.* 1 *Burrows' Rep. p.* 148.

Conviction on the Game Acts, must be particularly and negatively specified, that defendant had not any of the qualifications required by Stat. 22 & 23 Car. II. chap. 25.

This was a conviction, (which stood in the crown-paper) upon 5 Ann. c. 14. It was made by John Bythesea and John Turner, Esq. two justices of the peace for the county of Wilts; and was to the effect following.—Be it remembered, that on, &c. John Webb, of the parish of Hilperton, in the county of Wilts aforesaid, yeoman, in his own proper person, cometh before us, &c. justices, &c. And now he giveth us the said justices to understand and be informed, that one Maurice Jarvis of Trowbridge, in the county of Wilts, labourer, within three months now last past, that is to say, on the 4th day of September now last past, in the 28th year, &c. with force and arms, in a certain field commonly called, &c. lying and being within the parish and manor of Hilperton aforesaid, in the county of Wilts aforesaid,

did unlawfully keep and use, and had in his custody and possession one setting-dog and setting-net for the destruction of the game; and did then and there ride with and hunt the said setting-dog, with an intent to kill and destroy game; he the said Maurice Jarvis at the time and place when he so kept and used the said setting dog and net, and had the same in his custody and possession, was not qualified by any laws or statutes of this realm, to kill game, or to keep or use any nets, dogs or other engines for the destruction of the game; contrary to the form of the statutes in that case made and provided. And thereupon afterwards, that is to say, on the said 12th day, &c. at, &c. aforesaid, Thomas Webb, servant and game-keeper to Edward Eyles, Esq. for the manor of Hilperton aforesaid, in the county of Wilts aforesaid, a credible witness in this behalf, in his own proper person, cometh before us, &c. and taketh his corporal oath on the Holy Gospel of God, to speak the truth of and concerning the premises above mentioned and specified in the said information before us the said, &c. the justices aforesaid, having sufficient power and authority to administer the said oath to the said Thomas Webb in this behalf; and the said Thomas Webb being so sworn as aforesaid, afterwards, that is to say, on the said 12th day, &c. upon his said oath so taken before us the said justices as aforesaid, saith, deposeth, and sweareth, of and concerning the premises aforesaid in the said information above mentioned and specified, "That, &c. [fully proving the fact;] he the said M. Jarvis, at the time and place when he so kept and used the said setting-dog and net, and had the same in his custody and possession, was not qualified by any laws or statutes of this realm to kill game, or to keep or use any nets, dogs, guns or other engines for the destruction of game; contrary to the form of the statutes in that case made and provided." Whereupon the A. D. 1756.

A. D. 1756. said M. J. having first been duly summoned in this behalf to answer the premises, and having had due notice thereof, afterwards, that is to say, at the house of, &c. appearing and being present in his proper person before us the said, &c. and the said Thomas Webb, the witness aforesaid, also appearing and being present before us the said justices; and the information aforesaid and the matter therein contained, and also the said evidence thereupon given, having been heard and understood by the said M. J. in the presence of the said Thomas Webb the witness aforesaid, and of us the said justices; he the said Maurice Jarvis is asked by us the said justices, "If he the said M. J. hath, knoweth, or can say any thing for himself in his own defence, touching and concerning the premises aforesaid; and why he the said M. J. should not be convicted of the premises aforesaid, charged on him in and by the said information." And the said Maurice Jarvis, now here before us the said justices, denies that he did keep and use the said setting dog and net, and had the same in his custody and possession, in manner and form as is above charged on him; but shews no sufficient cause before us the said justices, why he should not be convicted of the offence abovesaid charged on him in the said information. And upon hearing and examining the whole matter aforesaid, and every thing alledged by the said Maurice Jarvis touching and concerning the premises aforesaid, it manifestly and plainly appears unto us the said justices, that the said M. J. was not then any wise qualified, empowered, licensed or authorized, by or according to the laws of this realm, to kill game; and that the said M. J. is guilty of the premises abovesaid, charged on him in and by the said information. Therefore it is now here considered and adjudged by us the said justices, that the said M. J. upon the testimony of the said Tho. Webb the witness aforesaid, on his oath before us the

said justices so taken as aforesaid, be and is convicted of the premises aforesaid, according to the form of the statutes in such case made and provided; and that the said M. J. do forfeit the sum of 5*l*. for the offence aforesaid, as the statute directs, &c.—Mr. *Gould*, for the defendant, took exceptions to his conviction. 1st. The justices have not shewn that they had jurisdiction over this defendant. For they have not sufficiently shewn his defects of qualification; which ought to have been specifically particularized, with an allegation "that he had not any one of them:" I mean the qualifications mentioned in 22 & 23 C. 2. c. 25. To prove this to be necessary, he cited Rex v. Ellers. [Qu. what? or where?] H. 12 G. 1. 2 Ld. Raymond, 1415. Rex. v. John Hill; most directly in point. Bluet, qui tam, v. Needs, P. 9 G. 2. in C. B. (entered Tr. 7. 8 G. 2.) Comyns, 522, 523. Pas. 9 G. 2. (which he also cited, to shew the distinction between a declaration and a conviction;) a general averment is sufficient in a declaration: but convictions must set forth what was the want of qualification. M. 19 G. 2. B. R. Rex. v. Pickles, (the 2d exception in that case,) where it was indeed holden that it was not necessary to insert the inferred or argumentative qualification (collected from 5 Ann. c. 14. but not mentioned in 22 & 23 C. 2.) "of his not being lord of a manor:" but it was there agreed, that those required by the Act of 22, 23 C. 2. c. 25. ought to be negatively specified. 1 Strange, 497. Rex. v. Sparling, H. 8. G. 1. B. R. which was a conviction for swearing: and his occupation was therein said to be a leather-dresser; but it was not shewn that he was not a servant, labourer, common soldier, nor seaman. The Court held that giving him the addition of leather-dresser was not enough; and instanced the necessity of specifying the particulars of the defendant's want of qualification, in convictions on the Game Act; in order to give the jus- A. D. 1756.

A. D. 1756. tices a jurisdiction which they otherwise have not: and they also held that conviction naught, because the particular oaths and curses were not set forth. And that conviction was accordingly quashed. 2d Exception. The witness was examined privately and ex parte, prior to the appearance of the defendant, and in the absence of the defendant, so that the defendant had no opportunity of cross-examining him. 3d Exception. The time when the defendant was unqualified is not at all ascertained, in the adjudication of his being guilty. For it is only averred "that he was then unqualified:" but several days and times distinct from each other, have been antecedently mentioned. [V. 148, 119, 150.]—Mr. *Norton* contra, for the conviction, begun with the 2d exception. It was necessary for the justice to take a previous examination, as a ground and foundation for his issuing the summons: and when the defendant attended, after having been summoned, the evidence was then read to him; and the witness also attended; and the defendant was asked "what he had to say for himself;" and did not desire to cross-examine the witness. To the 1st exception, he answered, 1st, by citing Rex. v. Chandler, in 1 Ld. Raym. 581. Where *Holt*, in delivering the opinion of the Court upon a conviction for deer-stealing, says "that it is sufficient for the justices to pursue the words of the statutes; and they are not, in these summary convictions, confined to nice and strict legal forms; it is enough if they pursue the intent of the statutes." If the defendant is really qualified, he may shew it: but how can the prosecutor prove the negative? Some of the qualifications are such as cannot well be proved in the negative: but it is easy for him to prove the affirmative.—Tr. 9 G. 2. Rex v. Ford. Conviction for keeping an ale-house, without license. Objected, that there was another former law upon which he might have been convicted: and in 3 C. 1. c. 3. there

is a proviso to exempt such as have been so. But Cur' held that if the defendant had been before punished upon 5, 6 E. 6. c. 25. he might have shewn this. Vide 1 Strange, 555. S. C. Rex. v. Theed, 1 Strange, 608. Conviction for obstructing an excise-officer, who came to weigh candles. Objection, that the excise-officer's entry might have been by night, (by 8 Ann. c. 9.) and then there ought to have been a constable present.—Cur' That might have been shewn on the part of the defendant, if in fact so; and then he would not have been convicted: but they would not presume it. Now here the defendant did not insist upon being any way qualified; but only denied the commission of the fact. This conviction follows the very words of the Act of Queen Anne: which does not enumerate the qualifications as that of C. 2. does: and this conviction is on the * Act of Queen Anne; and not on 22, 23 C. 2. c. 25. 10 Mod. (Lucas) p.27. Queen v. Matthews, Tr. 10 Ann. B. R. [1st exception.] Viner's Abr. tit. Game, letter A. fo. 3. S. C. Burn. tit. Game, fo. 304. S. C. Which was a conviction on 5 Ann. c. 14. Where one of the qualifications (*viz.* not being a game-keeper, &c. being a new qualification allowed by that act) was omitted.—And Cur' held that it was not necessary to enumerate any; but as some of them were enumerated, it was fatal to omit another of them. [N. B. This case was adjourned.] Rex. v. Marriot, 4 G. 1. (1 Strange, 66.) was the very point. It was holden indeed that the witness cannot take upon himself to adjudge the qualification: but no notice at all was taken, in the determination of that case, of the justice not having adjudged it. Clearly this defect can, at the utmost, be only form: for in substance, 'tis the same thing. And it follows the Act of 5 Anne in terms. As to the case cited by Mr. Gould, of Rex. v. Ellers, it does not appear what the state of the case was. And the Case in Comyns, 522, 523. ra-

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* 5 Ann. c. 14.

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(1st exception.)

distinction is obvious between an action and a conviction. And there it was agreed (and it is given as the reason why it is not good upon a conviction,) "that it must be made out before the justice, that the party had no such qualifications as the law requires," before the justice can convict him: and the justice must return "that he had no manner of qualification." Here the witness swears only generally, "that the defendant was not qualified, &c." The justices adjudge it generally, only. The stream can go no higher than the spring-head. So the conclusion which the justices draw from the testimony of the witness must be as general as that testimony. In the Case of Rex v. Pickles, it was laid down as a rule, "That the want of the particular qualifications required by 22 & 23 C. 2. c. 25. ought to be negatively set out in convictions:" and the only question there was, Whether it was necessary to add "nor lord of a manor." Exceptio probat regulam: nor was the general rule at all doubted or disputed in that case. In indictments upon 8, 9 W. 3. c. 26. for having a coining-press, every thing which shews that the defendant had no authority, must be negatively set out. And so it was done in the indictment of Bell, which was lately argued before all the judges. I take the point to be settled by the constant tenor of all the authorities; and I think upon very good reason, (if there was need to enter into the reason at large, after it has been fully settled already.) Therefore I am of opinion that the conviction ought to be quashed.—Mr. Just. *Denison* concurred with Lord *Mansfield*. He said it was a clear case; and that it was fully settled and established "That in these convictions, the want of the particular qualifications mentioned in the Acts of 22 & 23 C. 2. ought to be negatively set out:" if not, the justices have no jurisdiction to convict the defendant as an offender. And the evidence and adjudication

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(1st exception.)

A. D. 1756. ought, both of them, to be, "That he has not these qualifications, which are specified in that act; nor any of them." Indeed you are not obliged to go further than the words of this act of parliament of 22 & 23 C. 2. and that was the Case of Rex. v. Pickles. But however, in that case, the present point was established, and taken to be indisputable. It is said, that "It is sufficient to lay the offence in the words of the act of parliament." But that is not always sufficient: it may be necessary to go further. P. 28 G 2. B. R. Rex. v. Chapman, about robbing an orchard, was a case where the mere pursuing the words of the statute was not sufficient. But this point now before us is a settled case: and therefore there is no need to enter into arguments about it. The conviction ought to be quashed.—Mr. Just. *Foster* concurred. On negative acts of parliament, the point is fully settled and established, "That the particular qualifications mentioned in the purview of them, must be negatively specified in convictions made upon them."—By the Court unanimously, conviction quashed.

Second exception.

Cooper v. Marshall. 1 *Burrows' Rep. p.* 259.

(2 Wils. 51. S. C.) Plea to an action of trespass for breaking, entering, and digging up plaintiff's close, and filling up and spoiling the coney-burrows there, under a right of common, that the coney-burrows were wrongfully, unlaw-

This case was the same point with a case of Cope v. Marshall, which had been formerly twice argued, (*viz.* on 28th June, 1754, and 31st January, 1755.) Both of them stood now in the paper for argument; the present case having been never argued at all, and the other having never been argued either before Lord Mansfield or Mr. Justice Wilmot. This case of Cooper v. Marshall stood first in the paper, and came on first. It was an action of trespass for breaking, entering, and digging up the plaintiff's close, and filling up and spoiling the coney-burrows there, &c.; and there was a 2d count for doing the like in the plaintiff's free warren. Several pleas were pleaded by leave of the Court. Plea—As to

the 1st count was a justication under a right of common in 20 acres, &c. and that the coney-burrows were wrongfully, unlawfully, and injuriously newly erected and kept up there: by reason whereof the said common was surcharged and spoiled: so that the defendant could not enjoy sufficient common in the said 20 acres, as of right he ought. And therefore he justifies the breaking, entering, and digging up the plaintiff's close, and filling up and spoiling the coney-burrows, as it was lawful for him to do, in order to abate the said nuisance. There was also a second justification, much to the same effect. To the 2d count—Were two justifications not much different from the former. The plaintiff demurs to these pleas: and the defendant joins in the demurrer. —Mr. *Morton* pro quer. The justification arises merely from the plaintiff's having surcharged the common: and the wording of the plea cannot alter the matter and substance of it. So that the defendant's calling it a nuisance will not make it so: but it really is a mere surcharge of common. Therefore the word "nuisance" is here misapplied. He cited Cro. Jac. 416. The Case of Fowler v. Saunders: where the prescription was treated as a prescription to make a nuisance, though not so expressed in terms. But it is not an illegal act, for the lord to place conies upon his own land; though the land be liable to right of common. They are beasts of warren, and profitable to the lord: and the commoner cannot chase and kill them. Bracton, lib. 4. 221. makes a difference between a nocumentum justum, and a nocumentum injuriosum. Fleta, lib. 4. c. 26. de nocument' servitutibus injuriosis, makes the like distinction: "Nocumentorum aliud, injuriosum et dampnosum; et aliud, dampnosum et non injuriosum." These authorities shew that the injury arises only from the excess. And the commoner has no such remedy, as the defendant here relies on. The question therefore is

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fully, and injuriously, newly erected and kept up there, by reason whereof the said common was surcharged and spoiled, so that defendant could not enjoy the common, as of right he ought; and thisin order to abate the said nuisance,held no justification.

A.D. 1756. "Whether the commoner has a right to dig up the lord's soil, in order to preserve his right of common?" The lord cannot indeed totally destroy the commoner's qualified interest, contrary to his own grant. Yet the lord has rights compatible with the commoner's right: and these are legal in their own nature: though they may become injurious by excess. On which head he cited Fleta, lib. 4. pa. 252. [V. Pa. 252, 253. in cap. 18. de pertinentiis.] But this justification puts the latter case upon the same foot with the former: whereas the commoner's remedy is really adequate only to the injury done to him. Now a surcharge of common is of the latter kind of injury: and yet he here claims a right to dig up the soil and destroy the conies. So that the remedy claimed by the justification exceeds the injury done. And indeed it would go further than a judgment upon a writ of admeasurement would carry it: for which he referred to Fitzh. Nat. Brev. 295. [276.] and Westm. 2. c. 8. [13 E. 1.] There the tenant who is guilty of a second surcharge shall only pay damages, and forfeit the overcharge to the king: whereas what is here claimed is a total confiscation of the lord's property, for his first injury done to the commoner. Authorities in point, or nearly so, that the commoner "cannot do this," are Godbolt, 122. Coney's Case, H. 29 Eliz. which is full in point: and the principal resolution is confirmed by 4 Leon. 7. Ould and Coney's Case, S. C. in which case it was adjudged "That the commoner cannot kill or destroy the conies which destroy his common:" but it appears by Godbolt, that "he may have other remedy. And per *Suit*, Justice, he may have an action of the case or assize against the lord, for putting in the conies, if he has not sufficient common left." Indeed it is said in 1 Leon. 7. "that he hath not any other remedy." But Fleta, lib. 4. c. 23. de admensur. Pasturæ, pa. 262, 263. justifies Mr. Justice *Suit*'s opinion, "that he

has remedy:" *viz.* either admensuration, or assize of novel disseisin. A commoner cannot even distrain the lord's beasts which surcharge a common. For which position he cited Godbolt, ut supra, pa. 124. as an authority. [V. what is there said per Godfrey, arguendo; but not any part of the resolution of the case.] Much less then can he destroy them. Cro. Eliz. 876. P. 43 Eliz. The case of Bellew v. Langden, the same point, and adjudged accordingly; "that the keeping of conies by the owner of the soil is lawful; and the killing them unlawful." And Owen, 114. S. C. (there called the case of Pellin v. Langden,) S. P. accordingly: which adds that the owner of the soil may make a fish-pond upon the common, and that the commoner could not destroy it. Yelv. 104. Hoddesdon Mil. v. Gresil, M. 5 Jac. B. R. and Cro. Jac. 195. P. 5 Jac. S. C. there called Hedesden v. Grissel; it was adjudged "that the commoner cannot kill nor chase the lord's beasts of the common; but his remedy is by assize or action on the case." Agreeable to this resolution—In a case in Cro. Jac. 229. M. 7 Jac. 1. there called Sir Jerome Horsey v. Hagberton, a plea very like the present, was over-ruled without defence. The case really was between Sir Jerome Horsey, and Mead, and Havor and his wife. The justification was, "of levelling the coney-burrows, and laying them smooth and even with the ground:" and the reason given for doing it, was "that uti non potuit his common prout debuit." Adjudged without argument, "that the commoner could not do this." After this the commoners tried their chance again, by altering their manner of pleading. This was in the case in 2 Bulstr. 116. Carrill v. Pack and Baker, Tr. 11 Jac. Here the coney-burrows were treated by the justification as holes made upon the common by the plaintiff, into which the commoners sheep fell, and that the sheep of the commoners often fell into A. D. 1756.

A. D. 1756. those holes, and were thereby lost: and therefore they justify the chasing the conies, and digging and filling up the burrows. And agreeably to this case, the pleading in the present case is, "that the plaintiff erected coney-burrows, &c." In that case all the cases and arguments were urged: and yet it was adjudged against the defendant, who had justified the chasing the conies, and digging down the burrows and filling up the holes. Since which time the grand point has never come in question.—Mr. *Aston* pro def. In the first place, it does not appear that the defendant did kill any of the conies: though Mr. Morton would suppose that to be implied in his digging and filling up the burrows. The lord may feed or depasture the common, I agree: and the commoner cannot kill or chase his cattle. But it does not follow, that where necessity obliges the commoner to abate a nuisance, he may not do it. And surcharging a common with rabbits in a great degree is a private nuisance. 1 Hawk. Pl. Cor. 197. c. 75. treats of common nuisances, and how they may be removed: and he says "that any one prejudiced by a private nuisance may destroy it." Pa. 199. § 12. is express. 2 Rol. Abr. tit. Indictment, letter Q. Nuisance, pl. 7, 8. A presentment of a surcharge of common is not good: because it concerns a private interest. The same, of an enclosure of common, in nuisance of the commoners. Bracton, lib. 4. c. 21. pa. 221. shews that the act was legal at first, the excess makes it a nuisance. But here the 2d plea is, "That the lord has erected so many coney-burrows that the commoner had not sufficient common left." And this fact is admitted by the demurrer. Therefore the lord has broken through the bound of right between the lord and the commoner. The lord cannot enclose or build upon the common. And there are no degrees of insufficiency: the only question is, "Whether they be or not be suf-

ficient common left?" As in the case in 2 Mod. 7. Smith v. Feverel. And the commoner may in such case abate the nuisance. 2 Inst. 88. is in point. 15 H. 7. 10. b. is also in point. He may also, indeed, if he chooses it, bring an action of trespass or assize. But he may abate them, without suit. Hale's Analysis, 110. [V. pa. 125. § 42.] Robert Mary's case, 9 Co. 112. b. affords the reason; *viz.* the preventing multiplicity of suits. As to the doctrine of the commoner's not meddling with the soil, the lord could approve before the Statute of Merton. 1 Ro. Rep. The case of Sir S. Proctor v. Sir J. Mallorie; per Coke; and agreed to by the Lord Chancellor. Fitzh. title Approvement (there cited.) And this appears too by the writ of quod permittat. Bracton, lib. 4. pa. 227. b. (the writ there) shews that the commoner might pull down pales, &c. 2 Inst. 88. ad idem. This is like all other cases of nuisance: a person may abate a nuisance to his property, though upon the land of another, 9 E. 4. 35. a. is so. As to Mr. Morton's cases, There is no material difference between destroying a hedge, and destroying a coney-burrow. Now 2 Mod. 65. The Case of Cæsar v. Mason is in point, "that the commoner may prostrate and abate a hedge:" and surely that is meddling with the soil. And there may be cases where the commoner may chase off the lord's beasts: as suppose they are infected. As to Coney's Case, it was very different from the present: for there the killing and carrying away was justified; whereas we do not justify killing, chasing, or taking away. So, the Case of Bellew v. Langden was killing. There was no pretence of any surcharge of common. It is a justification of killing the conies as being damage-feasant: and it is only adjudged there "that the killing them was unlawful." So Yelv. 104. was chasing and killing. And in those cases, there might be sufficient common left, for aught

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A. D. 1756. that appears to the contrary, in any one of them. Sir Jerome Horsey's Case is not like this. That is for breaking a warren: and the coney-burrows there are not said to be newly erected. And it was done to prevent the coney-burrows increasing so as to be a nuisance: not averring "that they were then a nuisance." Whereas here it is averred to be a nuisance, and a new erection. As to the Case of Carril v. Pack and Baker. 'Tis for entering the plaintiff's free warren, and digging the land. And there, in the justification, it is alledged to be done for the better preservation of the common. And the free warren is admitted: and therefore he could not justify the killing, &c. As to a pond, if it was so large as not to leave sufficient common, it would be a nuisance, and might be abated. 1 Lutw. 101. The Case of Hassard v. Cantrell which (was mentioned on a former argument) was only "that the commoner could not enjoy his common in so beneficial and ample a manner as before." But it does not say, as here, that there was not sufficient common left." Which is going a great deal further than that case does. Mr. *Morton* in reply, *Aston* agrees that the act of the lord is legal. Therefore it is not like acts which are against his own grant; or cases which become manifesti disseisina. "Ulterius nocumentum" imports a present nuisance—Lord *Mansfield* stopped Mr. *Morton* in his reply. "Whether it be or be not hurtful;" or "how far it may be so;" is not the question: the question turns upon the remedy; whether it is abatable; "whether the commoner can do himself justice." It may prejudicial to the commoner, yet not injurious: it may be both prejudicial and injurious, yet not abatable. The lord, by his grant of common, gives every thing incident to the enjoyment of it, (as ingress, egress, &c.:) and thereby authorizes to the commoner to remove every obstruction to his cattle's grazing the grass which grows upon such a spot of ground: be-

cause every such obstruction is directly contrary to the terms of the grant. A hedge, a gate, or a wall, to keep the commoner's cattle out, is inconsistent with a grant which gives them a right to come in. But the lord still remains owner of the soil; and is not debarred from exercising any act of ownership. The commoner has no right to meddle with the soil. The true distinction is taken in the Case of Mason v. Cæsar, in 2 Mod. 66.: where the Court was of opinton "that the defendant, a commoner, might abate the hedges; for thereby he did not meddle with the soil, but only pulled down the erection." The hedge stopped the commoner from entering, and putting in his beasts. The grant gave him leave to enter, and put in his beasts: therefore it virtually authorized him to remove any obstruction directly repugnant to that liberty. But in the present case, the lord has done nothing contrary to the grant: he has not obstructed the commoner from entering and putting in his cattle. The lord has a right to put conies upon the common: as appears from the Case of Carril v. Pack and Baker, in 2 Bulstr. 115, 116. The conies themselves naturally make the burrows. So that they are incident to the right of putting on the conies. If the lord surcharges, the commoner is injured in his right of common, it is true: but what is the commoner's remedy? Not to abate; not to be his own judge, in a complicated question, which may admit of nicety to determine. There is a certain line to be drawn: the lord has a right so far, but no farther. Yet the commoner cannot destroy or drive off the conies: nor, consequently, can he destroy the burrows; which is, in effect, destroying the conies. This is founded upon reason, and upon many authorities. Sir Jerome Horsey's Case [V. Burr. Rep. 262.] 2 Bulstr. 115, 116. The Case of Carril v. Pack and Baker [V. Burr. Rep. 262.] And its being a free warren makes no difference. So that the question is not, "Whether this be an injury:" but, A.D. 1756.

A. D. 1756. "Whether it is abatable." I think it so clear a case, that I have no difficulty at all about it.—Mr. Just. *Denison* declared the same thing: and he said he saw no difference between this case and the cases cited; but merely in the expression, *viz.* that in this case it is treated as a nuisance; which is not the expression in them. But this form of expression makes no difference. Upon this record, it must be taken, "that the plaintiff was owner of the soil, and had a free warren; and that there is not sufficient common left (by the increase of the conies) for the use of the commoner." The question then is, "Whether the commoner shall be instructed to destroy the estate of the lord, in order to preserve his own small right of common?" 1 Rol. Abr. 405. pl. 2. gives the reason why the commoner cannot * kill the conies, but ought to bring his assize or action; *viz.* "because he cannot be his own judge." So here this justification would make him a judge in his own cause. No: let him take his proper remedy. This is a plain reason; even if it was not supported by authorities: but the cases are also strong, to prove it. The only point of this case turns upon these pleadings calling it a nuisance. But this will make it a nuisance abatable by the defendant himself; nor can it alter the law. In Sir Jerome Horsey's Case, Cro. Jac. 239. It was adjudged "that the commoner has no other interest than to take the common by feeding his cattle there: and may not destroy the conies nor coney-burrows." A coney-burrow is not, of its own nature, a nuisance: on the contrary, it is essential to a free warren. Therefore the nuisance depends upon the number of them: and you can, at the utmost, only abate so much of the thing as is a nuisance. You cannot destroy the whole, (which is the right here claimed;) but only so much of the thing as makes it a nuisance. In 1 Strange, 688. In the Case of Rex v. Papineau, Lord Ch. Just. *Raymond* expressly declares so. Suppose a man builds his house

* Yet Roll says, "Dubitatur."

up so high, as to be a nuisance to his neighbour, by obstructing his lights, or in any other respect arising from its excess; you cannot destroy the whole house; but only so much of it as by its excess above what is allowable, constitutes the nuisance.—Mr. Justice *Foster* was of the same opinion. This justification is clearly bad. It is founded on a claim of right which cannot be maintained. It is admitted "that a commoner cannot, in this case, destroy the conies." Consequently, he cannot destroy the burrows: for the effect is destroying the conies. If the lord has exceeded the bounds of his right, the law is to determine the quantum of such excess, and to the law the commoner must resort for his remedy, if he is aggrieved.—Per Cur. unanimously, judgment for the plaintiff.—See the next case, the same point. A. D. 1756.

Cope v. Marshall. 1 *Burrows, p.* 268.

This being the same point with the last preceding Case of Cooper v. Marshall; the Court without argument at this time, (but this very Case had been argued twice before (*a*), though not before Lord *Mansfield* and Mr. Justice *Wilmot*,) gave the like judgment as last, above, *viz.* Judgment for the plaintiff.

(*a*) V. 1 Bur. 259.

Buxton v. Mingay. 2 *Wilson, p.* 70.

Trespass quare clausum fregit; the plaintiff declares that the defendant being an inferior tradesman, to wit, an apothecary, such a day committed the trespass by hunting in the plaintiff's close; upon the general issue not guilty, this case was tried at Thetford, March 13, 1752, before Mr. Justice *Denison*, when a verdict was found for the plaintiff, and 1*s.* damages and 40*s.* costs, subject to the opinion of this Court, upon a case made, which states, that it was proved at the trial, that the defendant at the time of the trespass was a surgeon and an apothecary, and not qualified to hunt or kill game

Game. Question on the Stat. 4 & 5 W. & M. c. 23. sec. 10. who is or is not an inferior tradesman.

A. D. 1756. within the intent of the statutes; that on the 27th of December, 1751, he was hunting with divers others not qualified, in company with a person who was properly qualified to kill game, and committed a trespass in the plaintiff's close. The question for the consideration of the Court is, whether upon the facts above stated the defendant shall be deemed an inferior tradesman within the intent and meaning of the statute 4 and 5 W. and M. c. 23. sec. 10. which runs thus: "And whereas great mischiefs do ensue by inferior tradesmen, apprentices, and other dissolute persons neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves and damage of their neighbours; for remedy whereof be it enacted by the authority aforesaid, that if any such person as aforesaid, shall presume to hunt, hawk, fish, or fowl, (unless in company with the master of such apprentice duly qualified by law,) such person or persons shall be subject to the penalties of this act, and shall or may be sued and prosecuted for their wilful trespass in such their coming on any person's land, and if found guilty thereof, the plaintiff shall not only recover his damages thereby sustained, but his full costs of suit; any former law to the contrary notwithstanding. So that if the defendant be a person within the meaning of this clause of the statute, the plaintiff shall have his full costs, otherwise no more costs than damages." This case was three or four times argued at the bar; and in this term by *Hewit*, Sergeant, for the plaintiff, and *Poole*, one of the King's Sergeants, for the defendant. It was said for the plaintiff, that there is no such distinction as superiority or inferiority between trades or tradesmen, either in legal or common apprehension; and that therefore the legislature could never mean to consider one trade as superior to another, or to make any distinction in trades, but that by the words "inferior

tradesmen," they meant every person in trade not qualified by law; and that this was a reasonable construction et secundum subjectum materiam, that statute being made for preservation of the game. For the defendant it was insisted, that to entitle one to go a hunting, there is no qualification necessary, and therefore a qualification is not the criterion to determine or try who is or is not an inferior tradesman within the true meaning of the statute, but that every case of this kind ought to be left to a jury, who might, with certainty sufficient, determine under the particular circumstances of the case, what person is or is not an inferior tradesman, otherwise the lord mayor, or richest tradesman in London, could not lawfully go a hunting without a qualification in lands, which could never be the meaning of the legislature. The Court being equally divided in opinion, delivered the same seriatim the last day of this term, the puisne judge beginning first.—*Noel*, Justice, for the defendant. I think it would be hard for me to say that every tradesman in this kingdom (though never so rich in money) who hath not a qualification in lands, shall pay full costs in a case like this; nor can I prevail upon myself to say that the defendant, because he is merely stated to be an apothecary, is therefore an inferior tradesman, or a dissolute person. It was argued for the plaintiff, that amongst tradesmen, as such, there can be no line drawn with respect to who are superior, and who are inferior, but that they are all upon an equal footing as tradesmen, and that therefore the legislature by the words "inferior tradesmen," meant such as were not qualified; but I think if this construction was to prevail, it would bring every gentleman (though of the best of families in England) as well as rich tradesmen who have not a qualification, within the meaning of this clause. It was argued for the defendant at the bar, that a qualification was not necessary to authorize a

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2 Stra. 1126. Comyns, 576.

A. D. 1756. person to go a hunting; I shall say nothing to that point, but however that may be, I think a person going out with a gentleman qualified to kill game, cannot be convicted for killing game as an unqualified person. It is said for the plaintiff, that if the qualification be not the true distinction, no line can be drawn between superior and inferior; but I answer, there is a known distinction universally agreed to be between tradesmen with respect to superior and inferior, as master, and journeyman and apprentice; and this is a natural subordination which answers the act of parliament in every respect, for journeymen and apprentices are plainly inferior, and within the mischief intended to be remedied: I do agree that the statute says, "unless in company with a master qualified," and that every apprentice being out a hunting, not in company with a master qualified, is within the statute. I think the jury at the trial ought to determine, under the particular circumstances of every case of this kind, whether the defendant be or be not an inferior tradesman, or dissolute person; and it is too much for me to say that this defendant, who is an apothecary and surgeon, is an inferior tradesman, or a dissolute person. In my own private opinion a surgeon is the fittest person in the world to be in the field with gentlemen a hunting, for I remember the master of a pack of hounds had his neck dislocated by a fall from his horse when out a hunting, and if a surgeon had not been near him when the accident happened, who pulled his neck right, the gentleman would most certainly have lost his life. It generally happens that near every great town in England some gentleman keeps a pack of dogs, and it is well known that he never goes out without being accompanied by many tradesmen as well as others not qualified; if therefore judgment in this case was to be for the plaintiff to have his full costs, it would lay a foundation for an

infinite number of suits. Upon the whole, I am of A. D. 1756.
opinion the defendant cannot be said to be an inferior tradesman, nor a dissolute person, and that the plaintiff ought to have no more costs than damages.—*Bathurst*, Justice, for the plaintiff. I think this a question of law and not of fact, and that the judges, and not the jury are to determine who are inferior tradesman, or dissolute persons, within this law. In order to find out the true construction of this statute, we must take the intent of the makers into consideration, which was plainly to secure the game from being destroyed by persons neglecting their lawful employments, as appears by the preamble. There may be an inferior and superior between master and journeymen and apprentice, but I can never be of opinion that the legislature intended to permit every master of every little mechanic trade to neglect his trade and go a hunting; the clause under consideration (it must be admitted) is a little obscure, but I am of opinion that every tradesman is inferior who is not qualified, and that is the only line we can possibly draw between inferior and superior. And I am inclined to think the parliament purposely penned the act in this obscure manner not to disoblige their constituents, many of whom are tradesmen. In Bennet and Talbois, Comyns, 26. it was objected that a clothier was not an inferior tradesman; sed non allocatur (says the book) for the statute seems to prohibit all trades. Upon the whole, I am of opinion that all qualified tradesmen are not inferior tradesmen, and that all unqualified tradesmen are inferior.—*Clive*, Justice, for the plaintiff. I entirely agree in opinion with my brother *Bathurst*. (Nota; he delivered his opinion to the same effect.—*Willes*, Lord Chief Justice, for the defendant. I think myself unfortunate whenever I differ in opinion with any of my brethren; however, I have the pleasure to reflect that, in the 20 years I have sat here, this is but

A. D. 1756. the third time I have differed with any of my associates. The single question here is, who is that tradesman shall pay full costs in a twelvepenny trespass, in hunting in company with a gentleman qualified. I do not think it necessary to draw any line at all in this case, but it ought to be considered upon its own circumstances; and I am clear of opinion the legislature could never intend that a surgeon is an inferior tradesman within this clause; I think the case consists both of matter of law and matter of fact, and if I had been to try this cause, I should have told the jury my opinion, upon hearing the evidence and the circumstances of the defendant, and have asked them, whether upon their oaths they could say that this defendant was an inferior tradesman, a dissolute person, or neglected his trade; and in this manner I should have spoken to them, and then left them to say what was their verdict upon the whole evidence and circumstances of the person and case of the defendant. For my own part I cannot upon my oath say that this defendant, merely as an apothecary and surgeon, is an inferior tradesman, or a dissolute person, and agree entirely with my brother *Noel*, that the plaintiff ought to have no more costs than damages; therefore as the Court is equally divided there can be no rule, but let the postea remain in Court.

A. D. 1758.

Knight v. Lillo. 2 Wilson, p. 81.

Trespass. Judgment for the plaintiff because the whole trespass in the declaration is not covered by the defendant's justification.

Trespass for breaking and entering the close of the plaintiff called Stow-Hill, and for treading down the grass there, and for eating other grass with cattle. The defendant pleaded three pleas: First, not guilty, to the whole declaration; 2dly, A justification in bar, that the plaintiff ought not to have his action against him for entering the said close and treading down the grass there, because he says, that the close lies in the hundred of Parslow, in the county of Salop, and that long before

the time when, &c. John Walcott, Esq. was and still is seised in fee of the said hundred, with its appurtenances, and that the said John Walcott, and all those whose estate he now hath, and at the said time when, &c. had of and in the said hundred, with its appurtenances, time out of mind, have been accustomed to have and use, and still of right ought to have and use the benefit, liberty, and privilege of entering into the said close for the purposes of seeking, taking, and killing game there within the said close, in which, &c. and of seeking, taking, and killing game there, as belonging and appertaining to the said hundred; wherefore the said defendant as servant of the said John Walcott, and by his command, at the said several times when, &c. entered into the said close, in which, &c. for the purposes of seeking, taking, and killing game there, and then and there shot at and killed game there found for the said John Walcott, as it was lawful for him to do, and in so doing unavoidably and necessarily trod down, spoiled, and consumed a little of the grass there, which is the same trespass, &c. and this he is ready to verify. The third plea is a like justification, only it does not say, "As belonging and appertaining to the said hundred;" the plaintiff joins issue upon the not guilty, and traverses the two prescriptions severally, whereupon issues are likewise joined. At the trial there was a verdict for the plaintiff upon the general issue, and a verdict for the defendant upon the other two issues upon the prescriptions. It was now moved by Sergeant *Poole* that the plaintiff ought to have judgment upon the whole record as to all the issues joined, alledging that both the prescriptions were bad in point of law. But the Court said there was not occasion to debate whether the prescriptions were good or not, for that the plaintiff at all events must have judgment upon the general issue, because there is a trespass laid in the

A. D. 1758.

Prescription for a liberty and privilege of entering the close to seek for and kill game there as appurtenant to a hundred.

A. D. 1758. declaration, viz. "the eating of grass with the defendant's cattle, of which he is found guilty, and which is not covered or answered by the justifications. And unless the plaintiff would waive that part of the finding of the jury as to the general issue and eating the grass, the Court refused to hear any argument touching the prescriptions. So the counsel being desirous to have the validity of the prescriptions determined, took time to know whether the plaintiff would waive his verdict upon the not guilty; and if he would not then judgment was for the plaintiff.

Rex v. Mallinson. 2 Burr. p. 679.

Objections to a conviction for unlawfully taking and killing fish, in that it did not allege defendant had not the license or consent of the owner; that it generally alledged that defendant took and killed the fish unlawfully and against the form of the statute; for these objections indictment was held insufficient, and therefore quashed.

This was a conviction for killing ten trouts. The conviction sets forth, that one John Keap, of, &c. came before the justice of peace, and gave information that the defendant Thomas Mallinson, of, &c. taylor; not having any lands and tenements or other estate of inheritance in his own right, nor in the right of his wife, of the clear yearly value of 100*l.* or for term of life; nor having any lease or leases of 99 years, or for any longer term, of the clear yearly value of 150*l.* nor being the son and heir apparent of an esquire, or other person of higher degree; nor being owner or keeper of any forest, park, chase, or warren, being stocked with deer or conies, for his own necessary use, in respect of such forest, park, chase, or warren; nor being lord of any manor or royalty, nor game-keeper of any lord or lady of any lordship or manor, duly made, constituted, or appointed, with power or authority to take, kill, or destroy the game in or upon any such lordship or manor; nor being a maker or seller of any nets, angles, leaps, piches, or other engines for the taking of fish; nor being owner of any river or fishery: nor being a fisherman lawfully authorized to fish with nets in navigable rivers or waters, nor an apprentice to any such fisherman; nor

in any wise whatsoever empowered, authorized, or qualified by the laws of this realm, either to take, kill, or destroy any sort of fish, fowl, or other game whatsoever, either for himself or for any other person or persons whomsoever, nor to keep or use any greyhound, setting-dogs, hays, lurchers, tunnels, nets, or any other engine to kill and destroy the game; on the 27th of June 31 G. 2. at Golcarr aforesaid, within the said riding, did, with a certain net, unlawfully take and kill ten fish, that is to say, ten trouts, contrary to the form of the statute in such case made and provided. Whereupon the said Thomas Manlinson, afterwards, on the said 27th day of June, in the year aforesaid, had notice of the said information, and of the offence therein charged upon him as aforesaid, and was then and there in due manner summoned to be and appear before the said justice at his dwelling-house in M. aforesaid, in the said West Riding, immediately upon his receipt of that summons, to make his defence against the said charge contained in the said information: but the said Thomas Mallinson neglected to appear, and doth not appear before the said justice, nor make any defence against the said charge; but maketh default therein. Wherefore the said justice afterwards, that is to say, on the 12th day of July, 31 G. 2. at his above-mentioned dwelling-house in M. aforesaid, in the said West Riding, (the said Thomas Mallinson having so been summoned, and having hitherto neglected to appear or make any defence against the said charge,) doth proceed to examine the truth of the charge aforesaid, in the said information contained. And hereupon John Whitley, of Golcarr aforesaid, cordwainer, being a credible witness, cometh before the said justice in his proper person, and before the said justice, upon his corporal oath, upon the Holy Evangelists of God, to him then and there administered by the said justice, deposeth, sweareth, and upon his A. D. 1758.

A. D. 1753. said oath affirmeth and saith, That the said Thomas Mallinson, not having any lands and tenements, or other estate of inheritance in his own right, nor in the right of his wife, of the clear yearly value of 100*l.* or for term of life; nor having any lease or leases of 99 years, or for any longer term, of the clear yearly value of 150*l.* nor being the son and heir apparent of an esquire, or other person of higher degree; nor being owner or keeper of any forest, park, chase, or warren, being stocked with deer or conies for his own necessary use in respect of such forest, park, chase, or warren; nor being lord of any manor or royalty, nor game-keeper of any lord or lady, of any lordship or manor, duly made, constituted, or appointed, with power or authority to take, kill, or destroy the game in or upon any such lordship or manor; nor being a maker or seller of any nets, angles, leaps, piches, or other engines for the taking of fish; nor being owner or occupier of any river or fishery; nor being a fisherman lawfully authorized to fish with nets and engines in navigable rivers or waters, nor an apprentice to any such fisherman; nor in any wise whatsoever empowered, authorized, or qualified by the laws of this realm, either to take, kill, or destroy any sort of fish, fowl, or other game whatsoever, either for himself or for any other person or persons whatsoever, nor to keep or use any greyhound, setting-dog, hays, lurchers, tunnels, nets, or any other engine to kill and destroy the game: on the 27th day of June, in the 31st year aforesaid, in Golcarr aforesaid, in the said riding, did, with a certain net, unlawfully take and kill ten fish, that is to say, ten trouts, contrary to the form of the statute in such case made and provided. And thereupon the said Thomas Mallinson, on the 12th day of July aforesaid, in the year aforesaid, is duly convicted before the said justice of the offence aforesaid, in the said information contained, and therein charged

upon him, by the oath of one credible witness, the aforesaid John Whitely, according to the form of the statute in such case made and provided. It is therefore adjudged by the said justice, that the said Thomas Mallinson is guilty of the offence aforesaid, in the said information contained; and is hereby convicted thereof according to the form of the statute in such case made and provided; and that the said Thomas Mallinson hath forfeited the sum of five pounds for his offences aforesaid; that is to say, ten shillings apiece for every and each of the abovementioned fish so taken and killed by the said Thomas Mallinson as aforesaid, amounting together to the said sum of 5*l.* to be levied and distributed according to the form of the statute in such case made and provided. In witness, &c.—Mr. *Norton*, on behalf of the defendant, made several objections to this conviction. 1st. The summons is bad, as set out; (though indeed it was not necessary to have set it out at all). It is, "to appear immediately;" which is not a reasonable summons. 1 Strange, 261. Rex v. Johnson. An objection of this sort was taken to a summons "to appear on the same day." It received indeed a satisfactory answer, from a fact, viz. the defendants having there actually appeared to it, and made a defence: which appearance and defence cured all defects in the summons. 2d Objection. Here is not a full negative adjudication of the defendant's want of qualification: for here it is not stated "That the defendant had not the licence or consent of the owner." And as this essential circumstance is omitted, the general allegation of his "taking and killing the fish unlawfully and against the statute," is not sufficient. V. 1 Burr. p. 154, 155. Rex v. Jarvis, H. 30 G. 2. 3d Objection. It might be his own fish and in his own pond, for aught that appears to the contrary: for it is only alledged "That he killed ten trouts

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at such a place." The conviction seems to be intended upon (a) 4 and 5 W. 3. c. 23. §3.—Mr. *Yates*, contra, for the prosecutor. 1st. No precise time of appearance is requisite to be fixed by the summons: and this gives a larger latitude than if a day and hour had been fixed; for it means only, "as soon as he can." 2dly. Though this omission of his "not having the consent of the owner," cannot be supported upon the statute of 22 23 C. 2. c. 25. § 7.; yet it may, upon that of 4, 5 W. & M. c. 23.: which says only, "If any person not qualified by the laws of this land." (V. § 3.) And the Court will not presume a qualification. As in a conviction upon the Gin Act, in the Case of Rex v. Brian, 2 Strange, 1101. the Court would not presume that the gin was sold to be used in medicine. Rex v. Theed, M. 11 G. 1. in 2 Lord Raym. 1375. and in 1 Strange, 608. the conviction was presumed to be right; as it did not appear to be wrong. 3dly. The same answer holds to this objection, *viz.* "That the Court will not presume that the fish were the defendant's own," or "that he killed them in his own pond."—Lord *Mansfield*. This conviction is clearly bad. The offence provided against by the Act of 22, 23 C. 2. c. 25. is stealing fish; taking it (b) without the licence or consent of the owner. The jurisdiction given to the justice of peace is over every such offender or offenders in stealing, taking, or killing fish; (V. § 7.) Taking and killing, in the intention of this statute, means stealing. But this man is not convicted of any offence. For he is not charged with stealing, nor even with taking and killing the fish of another person, or in another person's pond. The offence specified in the statute is taking it "without the licence or consent of the "lord or owner of the water." But it may be his own pond, and his own fish, for any thing that appears to the contrary in the present case. Therefore if there was no

(a) It seems clearly to have been intended to be grounded on 22, 23 C. 2. c. 25. § 7. and not upon 4, 5 W & M.

(b) V. Rex. v. Uriah Cornen, Hill. 1769. 9 G. 3. B. R. post. 2279.

other fault in it, it is essentially bad, for this reason alone.—Mr. Justice *Denison*. It is full of faults: but this alone would be fatal. It does not appear that the fish he killed were not his own, or killed in his own ponds. —Mr. Justice *Foster*. The offence intended by the act is the invading another man's property. But there is no such charge here upon this man, as invading the property of another.—Mr. Justice *Wilmot*. This conviction is bad, for the faults that have been mentioned, and for a great many others: it is bad throughout.—Per Cur. unanimously, conviction quashed. A. D. 17..8.

Rex v. Midlam. 3 *Burrows, p.* 1720. A. D. 1765.

Where bringing a certiorari will not entitle the prosecutor to costs upon affirmation of conviction.

Sir *Fletcher Norton*, on behalf of the prosecutor, shewed cause against a rule which had been made upon him, to shew cause "Why I should not be directed by the Court, to forbear, and not to proceed to tax the prosecutor his costs in these causes, relative to the affirmance of the convictions against the defendant in these causes;" and also "Why the bond entered into by or on the behalf of the defendant, on allowing the certiorari, should not be delivered up to the said defendant or his clerk in Court to be cancelled." This certiorari was brought for removing a conviction upon the Game-Laws: and the present rule was grounded on an affidavit of hardship and oppression upon the defendant; namely, that although the defendant had paid the forfeiture upon the conviction, yet an action had been brought against him for the same offence; and when he wanted to plead this conviction in bar of the action, the justice had refused to give him a copy of it; and he was obliged to remove it by certiorari; and the prosecutor set it down in the paper, and got it affirmed; and then the prosecutor became nonsuited in the action. —Sir *Fletcher*, on behalf of the prosecutor, insisted on having his costs. He urged, that the Act of 5 Ann.

A. D 1765. c. 14. § 2. directs full costs to be paid upon removing these convictions, in case the conviction be affirmed. And this is general; and they must be paid in all cases where the conviction is affirmed; be the certiorari brought "upon any pretence whatsoever;" (for so the act of parliament is expressly worded.) And this conviction was affirmed. Therefore the Court cannot, upon this man's own affidavit, enter into the cause or occasion of the removal of the conviction by this certiorari.—Mr. *Wheeler* and Mr. *Walker*, contra. The removal of the conviction was absolutely necessary here; in order to it's being pleaded to an action brought for the same offence, under the 8 G. 2. c. 19. § 2. so that this was not an adverse proceeding; nor was the certiorari brought for vexation, but from necessity. The Case of Rex v. the Inhabitants of Madley, in 2 Sir J. S. 1198. is not unlike the present. The order was affirmed as to the father and mother, but quashed as to the daughter. It was resolved, that the parish who removed the order should not pay any costs; otherwise where a certiorari is brought unnecessarily, and consequently vexatiously; which, the Court there said, was the true test to go by. Now the present case falls within that true test: the removal was not unnecessary; and, consequently, not vexatious. This defendant had paid the penalty: and then the prosecutor brought an action for the same offence. The conviction was, therefore, necessarily to be removed: it was not removed upon a frivolous or vexatious cause. The whole effect of it was over: the penalty had been actually paid. The action brought for the same offence was mere oppression: the vexation was exercised upon the defendant, not by him.—Sir *Fletcher Norton* said, the defendant might have quashed the conviction if it was bad: and the penalty must have been refunded.—Lord *Mansfield*. This is not a case within the intention of the

Act of Parliament of 5 Ann. c. 14. § 2. for, this certiorari was not brought for vexation, or out of obstinacy or perverseness: nor to overhale or object to the conviction: but an action being brought for the same offence, the defendant in that action could not obtain (though he ought to have had it) a copy of the conviction from the justice of peace who made the conviction; and therefore he was obliged to bring a certiorari, to remove it; and he removed it for that purpose only. The prosecutor had no occasion, therefore, to be at any expense about it: for, the defendant did not object to it. But the prosecutor set it down in the paper, only to increase expense, and merely for vexation; supposing "That the defendant would have been obliged to pay for it." The plaintiff in the action was nonsuited: and I think the defendant (instead of paying costs) ought to have had an allowance of the costs he was put to in removing the conviction; as it was a necessary part of his defence. Therefore the present rule ought undoubtedly to be made absolute.—Mr. Justice *Wilmot*. This is one of the many cases where poachers are pursued with unintermitting vengeance. Here was not only that, but gross oppression also. He was extremely clear, that this was not a case within the intention of the second section of the 5 Ann. c. 14. and he thought (as Lord *Mansfield* also did) that the justice ought to have given the defendant a copy of the conviction, without putting him to the trouble and expense of bringing a certiorari to remove it. The bringing the action for the same offence was a gross oppression: and the plaintiff in it was nonsuited. And though he knew that the certiorari was brought only from necessity, (as the justice had refused to give the defendant a copy of it;) and that the defendant had actually pleaded it, and used it as a good one;—what, but oppression, could induce the prosecutor to set it down, and get it affirmed? he had A. D. 1765.

A. D. 1765. had the effect of it: the penalty had been paid. Therefore he concurred with Lord *Mansfield*, that the rule ought to be made absolute.—Mr. Justice *Yates* also concurred, for the same reasons. The justice ought to have given the defendant a copy of the conviction: for it was a record; and the defendant was entitled to it. And he ought to have been allowed the expense of his necessarily bringing this certiorari, in costs upon the nonsuit: for it was necessary to his defence in the action. He did not remove the conviction, in order to object to it: on the contrary, he had submitted to it, and had paid the penalty. He removed it out of necessity: it was necessary to his defence in the action. He thought this proceeding of the prosecutor to have been a very oppressive one, in every stage of it; and that the bringing the certiorari, under the circumstances of the present case, did not entitle the prosecutor to his costs upon affirmation of the conviction: and therefore this rule ought to be made absolute.—Mr. Justice *Aston* was clearly of the same opinion.—Per Cur. Rule made absolute; and the prosecutor to pay the costs out of pocket of this application.

Bulbrook v. Goodhere and others. 3 Burrows, p. 1768.

Water-bailiff of the river Thames has no right to take the nets of a person fishing in his own fishery. 1 Bla. Rep. 569. S. C.

This was a demurrer to an action of trespass for breaking and entering the plaintiff's close called the river Thames; and taking up, breaking and destroying his bucks there erected and placed for the catching of fish; and taking his fish out of the bucks, and carrying them away, and converting them to their own use. The defendants in their plea, alledge, that the close in question is part of the river Thames, and lies between Staines bridge and the head of the river; and that the conservancy of that part of the river is in the crown. Then they alledge, that the office of water-bailiff is in the gift of the crown. Then they set forth the Statute

of 1 Eliz. c. 17. which prohibits the taking of fish but only with the particular nets or tramels therein specified, under forfeiture of a pecuniary sum, and of the fish so taken, and also of the unlawful engines. Then they shew a grant from the crown to two of them, of the office of water-bailiff between Staines bridge and the head of the river. They alledge that these bucks were engines for catching of fish, other than the nets and tramels allowed by the said act of parliament; and were unlawful engines; and were wrongfully and unjustly erected there: and therefore they justify the taking up the bucks and throwing the fish into the river; two of them, as water-bailiff; and the other two, as their servants and by their command. The plaintiff in his replication admits the conservacy to be in the crown; and that the office of water-bailiff is in the gift of the crown; and admits the Act of 1 Eliz. c. 17. as stated in the plea; and admits the grant to Sir Robert Goodere and others; but protesting that the bucks which were taken away by the defendants, were not unlawful engines; for replication, he says, and insists, that all offences done and committed by unlawful fishings in the said river Thames, by the laws and statutes of this realm ought to have been and ought to be in due and legal manner presented, or information concerning such offences ought in due and legal manner to be made at a court of conservancy, or other court having sufficient and competent authority in that behalf; and there ought to have been and ought to be discussed, tried, and determined, according to the laws and statutes of this realm. Then he avers, that no information, presentation, conviction, or adjudication whatsoever had ever been made before the committing this trespass, at any court of conservacy, or other court concerning the said offence in the plea mentioned. He concludes therefore, that the defendants committed the trespass in their A. D. 1765.

A. D. 1765. own wrong; and prays judgment against them. The defendants demur generally. To which there is a joinder in demurrer.—Mr. *Walker* argued for the defendants. There is no one fact suggested, but a matter of law; nothing that we could take issue upon. The only fact alledged in our justification, and not admitted by the replication, is denied by protestation only. If we had rejoined, we could only deny facts suggested: we could not meddle with matter of law. Here they only suggest matter of law; *viz.* "That it ought to have been presented." We could not, by a rejoinder, take issue upon that matter of law.—Lord *Mansfield.* The point lies in a nut-shell: the only question is, "Whether they could seize the nets before conviction."—Mr. *Walker.* We do not claim the forfeitures: we only set up this that we have pleaded, as a defence or excuse for the trespass. We have a right, as water-bailiff, to stop and prevent an illegal nuisance contrary to the act of parliament; and to remove and abate this private nuisance: (though we have a right also to proceed subsequently for the penalty; which we have not yet done.) And he cited several cases, to prove that the party injured may remove a nuisance. F. N. B. 184, 185. 1 Ro. Abr. 664. Title Distress, Sir William Jones, 221. James v. Hayward. Cro. Car. 228. Reynell v. Champernoon. 5 Co. 2. part 101. Penruddock's Case. 9 Co. 57. William Aldred's Case. 2 Salk. 458. Rex & Regina v. Wilcox. And 3 Bulst. 197. Morrice v. Baker et ux. Where the injury is increasing, the party injured may stop it; whether the nuisance be public or private: and in private nuisances, he may have an action also for the injury already sustained. And this reasoning is applicable to the present case. N. B. The replication was admitted to be bad. But see the 6th, 7th, 8th, 9th, 10, and 11th sections of this act; where power is given "To inquire concerning

offences against it, by the oaths of 12 men;" and presentments and convictions are mentioned expressly.—Mr. *Ashhurst* was to have argued for the plaintiff: but it was not thought necessary.—Lord *Mansfield*. An offence is here created by an act of parliament. If you take advantage of this act, you must pursue the method prescribed by it. This is the plaintiff's own fishery: and he might have done what he would in it, before this prohibition by the act of parliament.—Mr. Justice *Wilmot* concurred. This is not to be considered as a nuisance, either public or private. The violation of this public law is not within the idea of a nuisance.—Mr. Justice *Yates* concurred. This was the plaintiff's own fishery; and the defendants have taken up the bucks, and taken the fish. This laying the bucks was no nuisance; and no power is given by the act, "to seize." The defendants are not to be their own judges. They ought to have followed the method prescribed by the act. The water-bailiff has no right to take the nets of a person fishing in his own fishery.—Mr. Justice *Aston* declared his assent, to the same effect. Whereupon, per Cur. Judgment for the plaintiff. A. D. 1765.

Beckwith v. Shordike and Hatch. 4 *Burrows, p.* 2092. A. D. 1768.

A merely accidental involuntary trespass may be justified, but a voluntary one cannot.

This was an action of trespass for entering the plaintiff's close, with guns and dogs; and killing the plaintiff's deer. The defendants pleaded, "Not guilty:" and a verdict was found for the plaintiff, with 30*s.* damages. A motion had been made, on behalf of the defendants, for a new trial; as the Judge who tried the cause (Mr. Baron *Adams*) was of opinion that the Jury ought not to have found the defendants guilty; it being an accident that happened without their intention, and contrary to their inclination. Upon shewing cause against a new trial, Mr. Sergeant *Whitaker* argued on behalf of the plaintiff; and Sir *Fletcher Norton*, on

A. D. 1768. behalf of the defendants. Upon the Baron's report of the trial and evidence, so far as it related to a new trial, it did not appear that the Baron had directed the Jury to find for the defendants; though it was his opinion "that they should have done so."—The Court thought that in cases of this nature, it must depend very much upon the particular circumstances appearing in evidence, "whether the persons who owned the dogs which, in their company, did the mischief, were or were not trespassers." In the present case, the two defendants entered, with guns and dogs, into a close of the plaintiff's adjoining to his paddock: and their dog pulled down and killed one of the plaintiff's deer. They have pleaded "Not guilty," to the trespass: and upon this plea of "Not guilty," this was sufficient evidence to prove them trespassers. They were not going along a foot-path; and their dog happened to escape from them, and run into the paddock and pulled down the deer against their will, (which Sir *Fletcher Norton* had represented the fact to have been;) nor was it another person's dog, that followed them by chance, (which had been also represented to have been the fact; though neither of these representations were verified by the Judge's report:) but it was their own dog; and they having these dogs and guns with them, were in the plaintiff's close, and not in a foot-path. The Jury therefore, who were to judge "quo animo they entered the plaintiff's close," considered it as an intentional trespass, and not as a mere involuntary accident: and the Judge, though he might think otherwise, did not direct them which way to find their verdict; but left it to them.—Lord *Mansfield* added, that the damages were so small, that it was not worth while to set the verdict aside upon payment of costs, and put the parties to the expense of a new trial: the play would not be worth the candle.—Mr. Justice *Yates* answered an objection of Sir *Fletcher*

Norton's, "That the proper action would have been for keeping a dog used to bite and run down deer, &c." by saying, that it might not have been in the plaintiff's power to prove that: it might probably be a dog that the plaintiff was an entire stranger to. The dog belonged to the defendants; and it would be too hard to put this proof of his ill qualities upon the plaintiff.—Mr. Justice *Aston* mentioned a case apposite to this subject; as it turned upon the distinction between voluntary and involuntary trespasses. It is reported in the additions to Lord Chief Justice *Popham*'s Reports; it is in page 161. Millen v. Fandrye—The defendant, with a little dog, chased the plaintiff's sheep out of his ground (where they were trespassing;) and drove them off his own ground. They went into another man's ground, which had no hedge to divide it from the defendant's grounds, which were contiguous. The dog pursued them into the other man's land, so next adjoining. The defendant, as soon as the sheep were out of the defendant's own land, called in his dog, and chid him. The owner of the sheep brought an action of trespass, for chasing his sheep. The Court gave judgment "quod quærens nil capiat per billam;" being of opinion "that trespass lay not in that case;" for, they held it to be an involuntary trespass; whereas a trespass that may not be justified, ought to be done voluntarily. They thought he might lawfully drive the sheep out of his own land, with his dog; and he did his best endeavour to recal the dog, when they were driven out of it; but the nature of a dog is such, that he could not be recalled and withdrawn suddenly and in an instant. Therefore trespass did not lie against him for what he had done. But the present case cannot be considered as an accidental involuntary trespass. The rule to shew cause "why the verdict should not be set aside, and a new trial granted," was discharged. A. D. 1768.

A.D. 1768. *Carter and another, v. Murcot and another.* 4 *Bur.* 2162.

In navigable rivers, or arms of the sea, fishery is common and public; in private rivers, not navigable, it belongs to the lords of the soil on each side.

This was an action of trespass for breaking and entering the plaintiff's close called The River, or The River Severn. The defendant pleaded that it is a navigable river; and also, that it is an arm of the sea, wherein every subject has a right to fish. The plaintiff (without traversing these allegations) replied, that this was part of the manor of Arlingham; that Mrs. Yates was seised of that manor: and prescribes for a several fishery there. Issue being joined thereon; a verdict was found for the plaintiff. On Monday, 9th November last, Mr. *Ashhurst*, on behalf of the defendant, moved in arrest of judgment, and had a rule to shew cause. He objected that though the fact was so found, yet the law is otherwise; *viz.* that every one has a right to fish in a navigable river, or in an arm of the sea. He cited 1 Mod. 105. Anonymous. 6 Mod. 73. Warren v. Matthews. 1 Salk. 357. S. C. and Ward v. Creswell, C. B. 14 and 15 G. 2. which recognizes 1 Mod. 105.—Mr. Sergeant *Nares*, for the plaintiff, now shewed cause. It is not an arm of the sea where the sea flows and reflows; but a part of a manor. It is found to be in the manor of Arlingham, in the county of Gloucester. And a place may be parcel of a manor, if between the high and low water marks; though the sea flows and reflows upon it. So is Sir Henry Constable's Case, 5 Co. 107. *a.* Bracton, lib. 2. c. 12.—Mr. *Ashhurst*, contra, for the rule. An exclusive right cannot be maintained by the subject, in a river that is an arm of the sea: the general right of fishing in an arm of the sea is common to all. The replication ought to have shewn that this was a separate pool: but the plaintiff cannot maintain a general right in the river, in exclusion of all other the king's subjects. In Sir Henry Constable's Case, the admiral had jurisdiction between the high and the low water mark. When the tide is in, the water

cannot belong to a manor; and a fishing can only be exercised when the tide is in—when there is water. In Sir John Davys's Reports, p. 55. the Case of the fishery in the river Banne in Ireland, it is said that the king has a right as high as the sea flows and reflows. And an arm of the sea, where the tide flows and reflows, is the same as the sea itself. Justinian Inst. lib. 1. c. 1. tit. 1. —6 Mod. 73. Warren v. Matthews. Every subject, of common right, may fish with lawful nets, &c. in a navigable river, as well as in the sea; and the king's grant cannot bar them thereof. 1 Salk. 357. S. C.—Per *Holt*, Chief Justice. "The subject has a right to fish in all navigable rivers, as he has to fish in the sea."—1 Mod. 105. Anon. In case of a river that flows and reflows, and is an arm of the sea, *Hale* says, "The right of fishing is primâ facie common to all."—Lord *Mansfield*. The rule of law is uniform. In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides: and it generally extends ad filum medium aquæ. But in navigable rivers, the proprietors of the land on each side have it not; the fishery is common; it is, primâ facie, in the king, and is public. If any one claims it exclusively, he must shew a right. If he can shew a right by prescription, he may then exercise an exclusive right; though the presumption is against him, unless he can prove such a prescriptive right. Here, it is claimed and found. It is therefore consistent with all the cases, "that he may have an exclusive privilege of fishing, although it be an arm of the sea." Such a right shall not be presumed; but the contrary, primâ facie: but it is capable of being proved; and must have been so in the present case.—Mr. Justice *Yates*. I was concerned in a case of this kind. Such a claim was made; but the claim failed, because it there happened that such a right could not be proved; therefore it was in that case determined that the right

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A. D. 1768. of fishing was common. But such a right may be proved. By the law of England, what is otherwise common may, by prescription, be appropriated. Grotius owns, that navigable rivers may be appropriated. The cited cases prove only this distinction, "That navigable rivers or arms of the sea belong to the Crown; and not (like private rivers) to the land-owners on each side;" and therefore the presumption lies the contrary way in the one case, from what it does in the other. Here, indeed, it lies, primâ facie, on the side of the king and the public; but it may nevertheless be appropriated by prescription. The case of the royal salmon-fishery in the river Banne, in Sir John Davys's Reports, is agreeable to this: and it is a very good case. It appears by it, that the Crown may grant a several fishery in a navigable river, where the sea flows and reflows, or in an arm of the sea; and in the Case of Abbotsbury there mentioned (*a*) the Court said, "it must be intended that "the abbey had originally had a grant from the Crown." And in the Case in 1 Mod. 105. *Hale* says truly, "If any one will appropriate a privilege to himself, the proof lieth on his side." Now if it may be granted, it may be prescribed for; a prescription implies a grant. But it cannot be presumed, it must be proved. Why then may not this plaintiff prescribe for an exclusive right of fishing in an arm of the sea, and prove this appropriation, though the primâ facie presumption is contrary?—Mr. Justice *Aston* concurred. This is the true distinction; and 1 Mod. 105. is in point.—Per Cur'. (*b*) Rule discharged.

(*a*) P. 57. a.

(*b*) Mr. J. Willes was gone out of court.

Rogers v. Carter. 2 Wilson, p. 387.

A game-keeper of a lord of a manor has a right to carry

Trespass against the defendant a justice of the peace for taking and carrying away the plaintiff's gun from him; upon the general issue Not guilty, which was tried before Lord Mansfield, upon the home circuit last

A. D. 1768.

a gun any where out of a manor.

summer, there was a verdict for the plaintiff; and Sergeant *Nares* having moved for a new trial, Mr. Justice *Gould* now reported to the Court the facts proved at the trial, as they had been stated to him by Lord *Mansfield*, *viz.* That Lord H. lord of the manor of Ringwood, by writing under his hand and seal on the 26th day of August last made and appointed the plaintiff his game-keeper within the said manor, which appointment or deputation was duly entered and registered with the clerk of the peace where the manor lies on the 27th of August; that on the 10th of October last, the plaintiff hunted and beat for game in the said manor, and in a large field there sprung a covey of partridges; after their first flight he shot at them within the manor; they took a second flight, and the plaintiff pursued them out of the manor, but could not find them; as he was returning again to the manor of Ringwood, he was met by the defendant about three quarters of a mile distant from that manor, who asked him if Lord H. had qualified him; the plaintiff answered, "I have a deputation from the lord of the manor of Ringwood;" the defendant replied, "You are now out of that manor," and demanded his gun, and took it from him, that the defendant did not shoot out of the manor, but was three quarters of a mile out of the manor with his gun and dog with an intention to shoot at game. By the Stat. 3 Geo. I. c. 11. it is enacted, that no lord of a manor shall make any person to be a game-keeper with power to kill game, unless such person be qualified by the laws of this realm so to do; or unless such person be truly and properly a servant to the said lord; or be immediately employed and appointed to take and kill the game for the sole use of the said lord, and not otherwise. It also appeared that the plaintiff was neither a qualified person to kill game by the laws of the realm, nor was properly a menial servant to the lord of the

A. D. 1768. manor; whereupon two questions arose at the trial, 1st, Whether from the facts proved, the plaintiff had been guilty of any offence against the Game-laws, so as to subject him to have his gun seized and taken from him by the defendant. 2d, Whether, as the plaintiff was neither a qualified person, nor a menial servant to the lord, he could be appointed his game-keeper.—Lord *Mansfield* thought the defendant had no right to seize the gun; and that it was not necessary that the plaintiff should be a qualified person, or a menial servant to the lord, in order to make him capable of having a deputation as a gamekeeper from the lord of the manor: so the jury found for the plaintiff. But as the lords of manors and country gentlemen present at the trial were of different opinions about this matter, Lord *Mansfield* said, he thought the best way was to move the Court for a new trial without costs, and if he had thought this could not have been done, he would have made a case for the opinion of the Court, or have directed the jury to have found a special verdict. This matter was debated on Friday, November the 18th, by Sergeant *Leigh*, for the plaintiff, and Sergeant *Nares*, for the defendant, and on Monday, the 21st of November, the Court discharged the rule to shew cause why there should not be a new trial.—Curia. There are two questions; 1st, Whether the plaintiff was a person qualified to receive a deputation from the lord of the manor to be a game-keeper at all. 2d, Supposing he is, whether the justice of peace (the defendant) under the Stat. 5 Ann. c. 14. s. 4. had a right to take his gun from him, while he was sporting, for the purpose of killing game, for we think it will make no difference in the case, whether he shot, or not, out of the manor. The Stat. 22 and 23 Car. 2. c. 25. is the first act that introduces game-keepers, whereby it is enacted that lords of manors &c. may by writing under their hands and seals authorize

game-keepers within their royalties to seize guns, &c. A. D. 1768.
or other engines for taking or killing game. See this statute. The Stat. 4 and 5 W. and M. c. 23. s. 4. puts game-keepers upon a footing with the ancient keepers of parks, whereby it is enacted, that all lords of manors or their game-keepers may within their royalties resist offenders in the night-time in the same manner, and be equally indemnified as if such fact had been committed within any ancient chase, park, or warren. See this statute. The Stat. 5 Ann. c. 14. s. 4. adds power to the game-keeper to kill game upon the manor. See this statute. The Stat. 9 Ann. c. 25. s. 1. enacts, that no lord or lady of a manor shall make above one game-keeper within one manor with power to kill game, and the name of such person shall be entered with the clerk of the peace, such entry to be made and viewed without fee. See the statute. The Stat. 3 Geo. 1. c. 11. reciting the Stat. 5 Ann. c. 14. and the Stat. 9 Ann. c. 25. and the abuse of those statutes, by lords of manors granting deputations to the farmers, tenants and occupiers of the lands within their respective manors to be game-keepers, with power to kill and destroy the game, which practice tended to the destruction of the game; for remedy whereof it was by this statute enacted, that no lord or lady of a manor shall appoint any person to be a game-keeper with power to kill game, unless such person be qualified, or be truly a servant to the said lord or lady, or immediately employed to kill game for the sole use of such lord or lady, &c. See the statute. As to the first question, we are all of opinion that the plaintiff was a person properly qualified to receive a deputation from the lord of the manor to be a game-keeper, although he was neither a qualified person, nor a menial servant to the lord of the manor; that this Stat. 3 Geo. 1. never was meant to check or hinder lords living at a distance (from their manors) from appointing

A. D. 1741. any person whatsoever to kill game for the immediate use of the lord; if it was otherwise this act would take away the right of every lord living at a great distance from his manor; we therefore are of opinion that the plaintiff was well qualified to kill game in the manor of Ringwood, and consequently to carry a gun for that purpose. The plaintiff being so qualified, the second question arises upon the Stat. 5 Ann. c. 14. sec. 4. whether the justice of peace under that statute had a right to take his gun from him while he was sporting for the purpose of killing game in another manor, out of the manor of Ringwood, for we take it to be true that the plaintiff intended to kill game when he was out of that manor of Ringwood, and when the gun was taken from him; and I think it makes no difference in the case whether he shot at game out of that manor of Ringwood or not, if he had killed game where he was not a game-keeper, he might have been convicted in the penalty of 5*l.* but he was entitled to keep and have dogs, guns and nets for the taking and killing of game any where; upon the debating this case at the bar, cases were cited from the civil law books and our law books, touching the property of game and other creatures feræ naturæ, and the lawfulness of pursuing the same, but we shall not take notice of those matters, because we are now to judge upon a law of penalties, and the words of penal laws must in all cases be strictly pursued; if the words be doubtful, courts of justice will explain and construe them in favour of the subject; if they be plain and clear words, the office of the Court is jus dicere et non dare, and we must not rack and torture words to punish the subject. The first part of sec. 4. of this Stat. 5 Ann. gives a penalty of 5*l.* against any person not qualified for keeping an engine to kill game, and then proceeds to give justices of peace and lords of manors power to take away the game, and such engine in the custody of

such person not qualified to keep the same; but game- A. D. 1768.
keepers are all qualified to keep such engines, therefore are not the objects of this clause. But it is objected the plaintiff was using the gun to kill game out of the manor of Ringwood; the answer is, he had a right to keep it any where, and if he killed game with it out of the manor he might have been convicted in the penalty aforesaid, but the justice had no right to take the gun from him; it would be confounding the right of keeping with the right of using the gun to say otherwise, we cannot think the legislature had any such meaning. The acts of parliament come from the lords of manors themselves, who most commonly furnish their game-keepers with dogs, guns, nets, &c. we cannot think their property was intended to be put in the power of their game-keepers to forfeit the same, whenever they might please to exceed their authority under the deputations. By the Stat. 22 and 23 Car. 2. game-keepers themselves are empowered to seize guns; what! shall a game-keeper in the very next manor to mine have a power to take my game-keeper's gun if he happen to be trespassing in my neighbour's manor? this would be a humiliating disgrace indeed, and could never be meant by the legislature, and if game-keepers were permitted to seize one another's guns, there would be a kind of border-war among them; if this was a doubtful case, we should incline to the same opinion we are of, to prevent breaches of the peace; but it is a clear case, and the game-keeper is neither within the words or meaning of the Stat. 5 Ann. c. 14. s. 4. Upon the whole we are all of opinion that the gun of a game-keeper of a manor cannot be seized either eundo or redeundo, or any where else, and that the defendant the justice of peace had no right to take away the plaintiff's gun from him; the rule to shew cause why there should not be a new trial was discharged. Per totam Curiam.

A. D. 1769.

The King v. Uriah Corden. 4 *Burrows, p.* 2279.

Conviction on Stat. 5 G. 3. c. 14. for preservation of fish quashed, because it should appear thereon, that the fishing was without the consent of the owner.

This was a conviction by a justice of peace, upon the third section of the Act of 5 G. 3. c. 14. "for the more effectual preservation of fish in fishponds and other waters." It set forth that on a specified day, at a specified place, Martha Buxton of the parish of Ashborne in the county of Derby, spinster, cometh in her own proper person before the justice, and upon her corporal oath, &c. &c. giveth me, the said justice, to understand and be informed, that Uriah Corden, of Clifton, in the parish of Ashborne in the said county, gentleman, on the 18th day of June last past, in the parish of Ashborne aforesaid, did fish with a net in a brook or stream called the Schoo Brook, in that part of the said brook which runneth between the manor of Clifton and the manor of Offcoat and Underwood in the said county; and did then and there take, kill, and destroy several fish, against the form of the statute in such case made and provided; he the said Uriah Corden (*a*) not having any just right or claim to take, kill or carry away any such fish; and the said part of the said brook or stream, wherein and whereupon the said fish were so taken, killed and carried away, not being in any park or paddock, or in any garden, orchard or yard adjoining or belonging to any dwelling-house, but in other enclosed ground then and there, being private property. And further, on the same day and year aforesaid, and at the place aforesaid, cometh one John Chatterton of Ashborne aforesaid, gentleman, and giveth me, the said justice, to understand that Richard Hayne of Ashborne aforesaid, Esq. is the true and lawful owner of the fishery of the aforesaid part of the said brook called Schoo Brook, which runneth between the manor of Clifton and the manor of Offcoate and Underwood in the county aforesaid. And thereupon the said Martha Buxton, the informant aforesaid, prays that

(*a*) See the proviso in the 6th section of this act.

that the said Uriah Corden may be convicted of the offence aforesaid, according to the form of the statute in such case lately made and provided. Whereupon, afterwards, to wit, upon the 16th day of July in the year aforesaid, at Ashborne aforesaid, in the county aforesaid, he the said Uriah Corden being by virtue of my warrant brought before me the justice aforesaid at Ashborne aforesaid, to answer the said charge contained in the said information, and having heard the same, he the said Uriah Corden is asked by me the said justice "If he can say any thing for himself why he the said Uriah Corden should not be convicted of the premises above charged upon him in form aforesaid:" and because he the said Uriah Corden doth not nor can say any thing in his own defence, touching and concerning the premises aforesaid, but doth of his own accord freely and voluntarily acknowledge and confess all and singular the said premises to be true, in manner and form as the same are charged upon him in the said information; and because, all and singular the premises being heard and fully understood by me the said justice, it manifestly appears to me that he the said Uriah Corden is guilty of the abovementioned offence so laid to his charge; it is therefore adjudged by me the said justice, that the said Uriah Corden is guilty of the aforesaid offence; and that he be and he is hereby convicted by me the justice aforesaid, of the premises aforesaid, according to the form of the statute aforesaid; and I the justice aforesaid do award and adjudge, that for the premises aforesaid he hath forfeited the sum of five pounds of lawful money of Great Britain, to be paid as the statute aforesaid doth direct. In witness whereof, I the said justice to this record of conviction as aforesaid have set my hand and seal, at Ashborne aforesaid, in the county aforesaid, the 16th day of July in the year above-written. R. Beresford, (L.S.) A. D. 1769.

A. D. 1769. This case was twice argued by counsel on both sides. The counsel for the defendant took three exceptions to the conviction. 1st exception. It does not appear that this conviction was made upon the complaint of the owner, or by authority from the owner; or even that this was a fishing without the consent of the owner. Whereas it appears clearly, upon considering this whole act of parliament, and comparing one part of it with another, that the complaint of the owner is essentially necessary to the jurisdiction given to the justice of peace by this third clause of it. See the Case of the King v. Mallinson, M. 32 G. 2. B. R. Bur. Rep. p. 681, 682.—2d exception. There is no proof upon oath, that Mr. Hayne was the owner; or who else was so. John Chatterton's information is not upon oath: and it is confined to the time of giving it; but says nothing about who was owner at the time of the fishing. —3d exception. The adjudication is "that the defendant hath forfeited the sum of five pounds, to be paid as the statute aforesaid doth direct." Whereas it ought to have particularly specified and directed to whom it should be paid. It was answered to these exceptions. 1st. There are no expressions in this Act of 5 G. S. c. 14. which require the complaint to the justice to be made by the owner. The words are general: the jurisdiction is given to the justice, "upon complaint made to him upon oath." 2d. The defendant has confessed the whole charge: and part of it is, "that Mr. Hayne was the owner." 3d. The act itself directs "that the party convicted shall immediately after conviction pay the penalty of five pounds to such justice or justices before whom he shall be convicted, for the use of such person or persons as the same is thereby appointed to be forfeited and paid unto." It is enough to say, "convictus est, et forisfaciet the sum of money juxta formam statuti." 1 Salk. 383. Regina v. Barret. 2 Sir J. Strange, 858.

Rex v. Hawks.—The Court all concurred in holding this conviction to be a bad one. They thought that a (a) tight hand ought to be holden over these summary convictions; and it ought to appear to the Court, that the justice has jurisdiction in the case: they ought to be kept to a proper degree of strictness; and not to be made arbitrarily and without authority. In the present case, they held that the justice does not appear to have jurisdiction. Here is no complaint from the owner; nor does it even appear to have been without his consent. It ought, at least, to appear that it was without his consent. This is plainly implied in the act of parliament: the giving the penalty to the owner shews it. Here, it does not sufficiently appear that this was private property; or who was the owner. The witness who gives the justice to understand "that Mr. Hayne is the owner," was not upon oath; and was therefore no witness. The ownership is not sufficiently charged: neither is it confessed. The confession goes no further than the matters charged. The words in the conviction "not having any just right or claim to take, kill, or carry away any such fish," are the words and opinion of Martha Buxton; not of the justice of peace who has made the conviction: and they are too general. The proviso from whence they are taken, means to except such persons as have a special right to fish in the fishery of another. The offence intended in this conviction is fishing in the fishery of Mr. Hayne, being private property. But all this might be done, for aught that appears upon this conviction, with the consent of the owner. The fact ought to appear so that the Court may be able to judge whether the conviction be agreeable to law. If the owner had been the complainer, that would have shewn his dissent: but this conviction is upon the complaint of Martha Buxton; and it does not appear that the defendant has been guilty of fishing

A. D. 1769.

(a) Vid. 2 Bur. Rep. p. 613. accordingly.

A. D. 1771. in any water being private property, without consent of the owner.—Per Cur.' unanimously. Conviction quashed.

Seymour and others v. Lord Courtenay and others. 5 *Burrows, p.* 2814.

Whether a several fishery may be claimed by a person not owner of the soil, does not seem to be determined.

This was an action of trespass for disturbing the plaintiffs' several fishery. At the trial, the plaintiffs were nonsuited. Mr. Sergeant *Burland*, on behalf of the plaintiffs, moved (upon Saturday, 9th November, 1771,) to set aside this nonsuit, without payment of costs; and that they might have a new trial. Lord Clifford was the real plaintiff, and Lord Courtenay the real defendant; they were both present at the time of the motion. The objection made by the counsel for the defendants at the trial was to the evidence adduced by the plaintiffs to prove their title. Their principal exception to its sufficiency was, that the plaintiffs had only proved a grant of this fishery from Lord Clifford, with the exception of an oystery, and also a reservation of a right to Lord Clifford, the grantor, of taking fish for the supply of his own table; which was so far from proving a right to a several fishery, that it was directly contrary to the idea of it. A several fishery must be exclusive of the right of all other persons: whereas others have here a right to fish throughout the whole limits of the fishery. Therefore the plaintiffs cannot, upon this evidence, maintain an action of trespass for disturbing them in their several fishery. This objection was allowed at the trial: and the plaintiffs were nonsuited. There was also another exception taken at the trial; *viz.* that it was not proved that the soil was granted to the plaintiffs: and none can have a several fishery, but the owner of the soil. Rule to shew cause. On Tuesday, 19th November, 1771, cause was shewn, by Sergeant *Davy*, Mr. *Dunning*, Mr. *Thomas*

Gould, Mr. *Walker*, and Mr. *Impey*, on behalf of the defendants. They insisted that the plaintiffs had declared upon a title which they plainly had not. Their 2d, 3d, and 4th counts are upon a several fishery: and they claiman exclusive right. But they have, in fact, only a limited, qualified right. They have only proved a right to a free fishery; not to a separate fishery. Lord Clifford neither did grant, nor intended to grant an exclusive right: he has expressly excepted the oystery, and has reserved a right to himself to fish for every other sort of fish for his own table. The grantees therefore could not have a separate exclusive fishery, when others had a right to fish as well as they. Neither can a person have a separate fishery, without being owner of the soil. And here Lord Clifford neither did grant, nor intended to grant the soil. It is plain, therefore, that there ought to be judgment of nonsuit. See 2 Salk. 637. Smith v. Kemp, Tr. 4 W. and M. B. R. and the cases there mentioned, and Carthew, 285, 286. S. C.—Sergeant *Burland*, Sergeant *Glynn*, and Mr. *Mansfield*, counsel for the plaintiffs, argued that the soil did pass by this grant, which was a grant, they said, of a several fishery: and a several fishery may exist without the person's being owner of the soil(*a*). A subject may have a several fishery; though the crown has a right to the royal fish. A subject may have an exclusive several fishery in an arm of the sea. A grant of a several fishery is capable of particular reservations or exceptions: the thing may be granted; and yet a part of it reserved. A close may be granted, excepting an acre; woods, except certain timber; advowsons, except particular presentations; and so of all other inheritances: and why not the same, in the grant of a several fishery? A fishery may be granted, except a particular pool. If Lord Clifford had granted a liberty of fishing to a neighbouring gentleman, yet

A. D. 1771.

(*a*) V. 1 In. 4. b. an Bracton 208. an Inst. 12

A. D. 1771. he would still have had a several fishery: such a grant would not have destroyed his right. Here, the reservation to Lord Clifford, of the liberty of taking fish for his own table, is only a licence: it does not derogate from the grant. And the oystery is only a part of the water. It is not necessary that a several fishery be totally and absolutely exclusive of all other persons. A several fishery may be granted to two or more persons; or it may descend to two or more tenants in common: and yet, in those cases, it could not be an exclusive right. A tenant in common may declare, as if possessed of the whole. This was a several fishery in Lord Clifford; and it must be the same in his grantee, as it was in Lord Clifford the grantor. Neither the exception of the oystery nor the reservation to Lord Clifford can alter the nature of the fishery, and convert it from a several one into a free one, or into a fishery in common: it still remains a several fishery as to all the rest of the world. This no more changes the nature of the several fishery, than a licence to angle for a single hour would do. It is not requisite that a several fishery should be carried to such a rigid degree of exclusion; the epithet of a several fishery means no more than to distinguish such a right from a free fishery, or a fishery in common. The Court took a few days to advise. And on Monday, 25th November, 1771, Lord *Mansfield* delivered their resolution. It is not necessary for us, in the present case, to give any opinion "Whether a person can have a several fishery, without being owner of the soil;" as we think that it was the intention of this grantor to pass every thing that was necessary to convey a several fishery to the plaintiffs. If there had been no other count in this declaration, but the first, (which is for breaking their close covered with water,) it might have been necessary for us to have determined whether the ownership of the

soil was in the plaintiffs or not: but if there are other counts in the declaration, upon which the plaintiffs might maintain their action, that will be a sufficient ground for us to set aside the nonsuit. And we are all of opinion, that the plaintiffs might maintain their action, upon the 2d, 3d, and 4th counts, (which are for disturbing them in their several fishery.) We agree in the position, that, in order to constitute a several fishery, it is requisite that the party claiming it should so far have the right of fishing, independent of all others, as that no person should have a co-extensive right with him in the subject claimed: (for, where any person has such co-extensive right, there it is only a free fishery.) But we think that a partial independent right in another, or a limited liberty, does not derogate from the right of the general owner. Here, Lord Clifford being the general owner demised to the plaintiffs, reserving a particular species of fishing, *viz.* the oystery, which, in its nature, is to be exercised in a particular mode. A reservation is equal to a grant. Therefore it brings it to the same question, as if the plaintiffs, being the general owners, had granted the sole right of fishing for oysters, to Lord Clifford. And, taking that to be the case, we think the plaintiff would still have had a several fishery to all intents and purposes, except as to the taking oysters; which is no part of the present dispute. And as to the liberty reserved to Lord Clifford, of taking fish for his own table, that is a mere limited liberty, and not co-extensive with the right of the plaintiffs, who can take fish at all times, and for all purposes. If this is not a several fishery, it would not be any species of fishing, that the law knows. It could not be a free fishery; because no person has a co-extensive right with the plaintiffs. And as to its being a common of fishery, that is not pretended. Therefore, on the whole, we think

A. D. 1771.

A. D. 1771. it can be no other than a several fishery; and that the plaintiffs might maintain their action, on those counts adapted to such right; and consequently, that the nonsuit should be set aside, and a new trial granted. Rule —That the nonsuit be set aside, (without costs on either side;) and a new trial had.

The King v. Newman and others. Lofft's Rep. p. 178.

Using a greyhound merely, in company with a qualified gentleman who keeps it, is not within the statute.

On an information for undue conviction on the statute against keeping and using greyhounds. Mr. *Newman*, it appears on the evidence, convicted two persons who were themselves unqualified, but who were out with a qualified person; which they pleaded in their defence, and that the dogs were not their own. He said he knew it, and, turning to his brother justice, said, "They are duly convicted," and obliged his brother justice to convict them. The information is against both justices. In this case it was said, on the part of the justice, that the convicted persons not being qualified by their own evidence, and it not appearing by any evidence expressly, that the person they were with was a qualified person, or that the dogs were, as they asserted, not theirs, but his, that the information might not be granted. It was farther said, that it has never been adjudged, that unqualified persons out with qualified were free from the penalty; nor that it signified whether the dogs belonged to the qualified men, or to the others: for the being out to use them, was sufficient within the statute; or at least it had been much doubted.—Sergeant *Burland*, for the defendants.—Lord *Mansfield*. Let the Justice pay the whole costs, and go before the Master.—Serjeant *Burland*. Does your Lordship think them sufficiently qualified?—Lord *Mansfield*. Yes; and it's matter of tenderness to take it this way. I know you to be very judicious, and thought you led to it. The defence

you set up for the Justice was none; if it had been ever thought of by them. I remember the case at Exeter of the poacher; the greyhound taken in his possession: even a special jury had no doubt, but found for the defendant. Keeping and using are the words of the statute. Shall not a gentleman take any body out with him, to beat the bushes, and see a hare killed? It appeared too, on the evidence, that the summons was taken out on the Sunday, and that the parties asked an hour's time to go for Mr. Linch, the gentleman they went out with, who, they say, is worth several hundreds per annum. It is not pretended on the other side, but they might have brought this witness in three or fours at least. This, Lord *Mansfield* observes, with some of the above-mentioned, were very aggravating circumstances. However, you know the strength (he added) of your own case: take it by way of information.—Sergeant *Burland*, however, thought it advisable to desire leave then to refer it to the Master, which was granted accordingly. A. D. 1771.

Anonymous. Lofft's Rep. p. 364. A. D. 1773.

The presumption is, that he who has a separate fishery is owner of the soil. Vide Skinner, 342. Salk. Brook, title Peschariæ. Co Lit. 121. Roll. Abr. This was upon a case reserved, which was therefore observed to require a finding much less strict and circumstantial than a special verdict. And Lord Mansfield, I think, was of opinion, that notwithstanding Lord Coke's observation, the presumption certainly was, that the man who hath several fisheries is the owner of the soil; and that Sir John Davie observes upon Coke's objection to the contrary, and denies it expressly; and then if there is no evidence to the contrary, the presumption stands.—Mr. Justice *Aston*. That notwithstanding the dictum of Lord Coke (who

A. D. 1773. yet admits that by the words aquam suam the soil will pass) the case in Salkeld, 637. Case in Brooke plac. trespasse cited by Mr. Wallace, and another still stronger, 436. with Sir John Davie go to the contrary. —Curia omnis assensit.

Pallant v. Roll. 2 *Black. Rep. p.* 900.

In trespass for hunting, laid upon the Statute 4 and 5 W. and M. against the defendant as a dissolute person, &c. if the plaintiff proves the trespass but not the circumstances under the statute, he shall recover as in common actions of trespass, *viz.* no more costs than damages, if the damages are under 40*s*.

Trespass, for that the defendant "being a dissolute person, neglecting his employment, and following hunting and other game, and by no means qualified by law so to do, broke and entered the plaintiff's closes, and with dogs, guns, and other engines for destruction of the game, hunted upon the said closes, trod down the grass and corn, and broke the fences, &c. "against the form of the statute." On not guilty pleaded, and issue thereon, a verdict was found for the plaintiff at Bury assizes for one shilling damages, subject to the opinion of the Court upon this case. The defendant was not qualified in his own right to kill game, but was, and for three years had been, a menial servant and huntsman to Robert Leman, esq. a gentleman of 1500*l*. per annum estate, who has kept hounds these twenty years; and the defendant in December, 1771, went out by his master's orders with the hounds, his master not being present, and was beating over the plaintiff's grounds. The plaintiff desired the defendant to go off his land, which he refused, and at length found a hare, and hunted her over several pieces of land mentioned in the declaration, two of which were sown with wheat. Qu. Whether, if the Court should be of opinion that the defendant is not a dissolute person, &c. under Stat. 4 and 5 W. and M. c. 23. § 10. the plaintiff can recover against him in this action, or whether he ought to have brought a common action of trespass quare clausum fregit. This case was argued by *Sayer* for the plaintiff, and *Foster* for the defendant.

And by *De Grey*, Chief Justice. We have no doubt but that the defendant is not a dissolute person, &c. within the meaning of the statute. The only real question is, whether, as this action is framed, the plaintiff can recover any thing? He certainly cannot have his full costs; if he cannot recover any thing, but is nonsuit, he must pay costs: if he can recover as upon a common action of trespass, he saves his costs. Now certainly any man might have always brought an action of trespass for hunting upon his grounds. For this injury, among others, the Statute of Gloucester gave costs as well as damages. The Statute of Car. 2. to prevent vexation, lowered the costs, and if less than 40*s.* recovered, gave no more costs than damages. The Statute 4 and 5 W. and M. restored full costs again, even in case of small damages recovered against dissolute persons, inferior tradesmen, &c. This statute gives no new cause of action: the old right of action always existed, and does still exist. The plaintiff complains of a trespass, and sues for the common law remedy. He also states collateral circumstances, which under the statute would entitle him to costs upon a verdict for small damages. If he proves those circumstances, he has his full costs; if they are not proved, they are mere words of surplusage, and the defendant stands exactly in the same situation as if the Statute 4 and 5 W. and M. had never been made. Many cases in the books have been cited, but none applicable to the present question. For the only point upon which the Court gives their opinion is, that the circumstances stated and not proved do not affect the cause of action itself, but merely a collateral consequence, that of costs.—*Gould*, *Blackstone*, and *Nares* accordant. Postea to the plaintiff, and verdict entered by consent, that the Jury find the defendant not a dis- A. D. 1773.

A. D. 1773. solute person, &c. but guilty of the trespass, damages one shilling, costs one shilling.

A. D. 1777.

Binstead v. Buck. 2 Black. Rep. p. 1117.

Trover lies for a dog that was lost, and which the defendant refuses to deliver, unless paid for his keeping.

Trover for a pointing dog. The plaintiff proved the dog to be his property, and that it was found at the defendant's house twelve months after it was lost. The defendant said the dog strayed there casually, and demanded 20*s.* for twenty weeks keep, before he would deliver up the dog. A verdict for the plaintiff subject to the opinion of the Court, whether this refusal amounted to a conversion of the dog?—*Foster* for the defendant declined arguing the question; and so postea to the plaintiff.

Lord Dacre v. Tebb. 2 Black. Rep. p. 1151.

In trespass for breaking free warren, though damages under 40*s.* the plaintiff shall have full costs.

Declaration in trespass for breaking and entering his free warren in Aveley, in the county of Essex, and chasing, hunting, and killing divers foxes, hares, conies, partridges, and pheasants of the plaintiff, and taking away other his goods and chattels. On not guilty pleaded and trial by a special jury, the defendant was found guilty of breaking and entering the free warren of the plaintiff, and chasing and hunting one hare, damages 6*d.* and not guilty as to the residue.—*Glyn* for the plaintiff moved, that the prothonotary might tax full costs; alledging that the Statute 22 and 23 Car. 2. (which restricts costs in trespass, where the damages are under 40*s.* unless the freehold or title to the land came in question) did not extend to this action; in which there could not possibly be any question relating to the land, but merely to the franchise of free warren. For that act related only to such actions of trespass, where some injury was done to the land.—*Kempe* shewed for cause, that it was possible the freehold, or title to the land, might be so interwoven with

A. D. 1777.

the title to the free warren, that both might come in question. And where the title to the land might come in question, but did not, and the damages are under 40*s*. there shall be no more costs than damages.—*Gould*, Justice. I think the Act of Parliament is confined to such actions of trespass, where the soil or land is mentioned in the declaration as the subject of the trespass complained of. The right of free warren was not in the contemplation of the legislature.—*Blackstone*, Justice, of the same opinion. In actions instituted merely for breaking free warren it is impossible the title of the soil can ever come in question; for though both may concur in one person, yet the title to the free warren is always collateral to that of the land; for a man may have free warren in alieno solo. Besides, the hare so hunted was the personal property of the owner of the free warren; and if any injury be done to personal property, that will take it out of the statute, and entitle the plaintiff to full costs.—*Nares*, Justice, of the same opinion.—*De Grey*, Chief Justice, absent. Rule absolute for taxing full costs.

Avery v. Hoole. Cowper's Rep. p. 825.

A. D. 1778.

Declaration that the defendant used a gun, being an engine to kill and destroy the game. Held good, after verdict. Quære, if good upon a special demurrer.—A verdict will cure ambiguity; but it will not aid a case, where the gist of

This was an action of debt on the Game Laws, for using a gun to kill and destroy the game. Plea not guilty: and issue thereon. At the trial before Mr. Justice *Gould*, on the northern circuit, an objection was taken to the declaration, because it stated only, that the defendant used a gun, being an engine to kill and destroy the game, without averring that he used it for the destruction of the same.—Mr. Justice *Gould* thought the objection was on the record; therefore proceeded to try the cause, and the Jury found a verdict for the plaintiff.—Mr. *Arden*, on Thursday, May 6th, in this term, moved in arrest of judgment, upon the ground above mentioned; and cited the Case of Rex v. Hunt,

A. D. 1778. Pasch. 15 Geo. 3. B.R. Rex v. Gardiner, 2 Str. 1090.—Mr. *Wallace* and Mr. *Bolton* now shewed cause, and insisted, that this being after trial, the objection was cured by the verdict. In effect, however, the offence was sufficiently charged. For if the words, "being an engine," were read, as they ought to be, in a parenthesis, the rest would be an express averment, "that the gun was used to destroy the game." The Cases of Rex v. Hunt, East. 15 Geo. 3. B. R. and Rex v. Gardiner, 2 Str. 1090. Andrews, 255. S. C. cited in support of the motion, were cases of convictions. The latter was held bad, because the defendant was convicted of keeping only, not of using: and the former was given up without argument. But admitting it had been argued, a conviction and declaration are very different. In Bluet v. Needs, Comyns, 522. it was expressly held to be matter of evidence for the Jury, Whether a gun is an engine to kill and destroy the game? and here the Jury have pronounced it so. The rule in criminal as well as in civil cases is, that a verdict will supply whatever must of necessity be given in evidence. To this purpose they cited Alston versus Buscough, Carth. 304. and Frederick v. Lookup, 4 Burr. 2018. The latter was an action qui tam, for treble the value of money won at play, brought by the plaintiff, on behalf of himself and the poor of the parish of Covent Garden: and the offence was charged only at Westminster aforesaid, without specifying any parish: and after verdict for the plaintiff was adjudged good. Here, the objection is after verdict; and therefore cured.—Mr. *Arden*, contra, in support of the rule, contended, that where a declaration does not contain a sufficient charge, verdict will not help it; and here no offence is charged. All the precedents agree, that the destruction of the game must be referred to the use, and not to the engine: and there is no difference as to the sense of the words, whether

the action is omitted. S. C. Doug. 683. Note 1.

hey are contained in a declaration or a conviction. In A. D. 1778.
Buxenden v. Sharp, 2 Salk. 662. which was an action or keeping a vicious bull, the scienter being omitted in he declaration, was held naught after verdict. In Rea-on v. Lisle, Comyns, 576. the judgment was arrested ecause it was only charged in the declaration that the efendant used a dog to kill game, without shewing that was any of the dogs described by the act. And in looker v. Wilkes, 2 Str. 1126. it was decided, that his being a penal statute, could not be extended by im-lication. Upon these authorities, he prayed the rule ight be made absolute.—Lord *Mansfield*. The Case of ex v. Hunt was given up without argument. What assed at the trial in this case is material; and shews the rue distinction. No objection was made at Nisi Prius, hat the evidence did not prove the offence; but the ob-ection was, that the offence was not charged in the de-laration with sufficient certainty. The Judge answered, hat the objection, if founded at all, appeared on the ecord, and therefore he would try the cause according o that construction with constitutes the offence. It has een very truly said, that a verdict will not mend the natter, where the gist of the action is not laid in the eclaration. But it will cure ambiguity. Here, ac-ording to one method of pointing the sentence, putting comma after the word "engine," the offence is suffi-iently charged; for it will then stand thus: "that the lefendant used a gun being an engine for the destruction f the game." And there is no charge in the declara-ion but according to that construction. This differs idely from the case of a conviction; for there, great icety is required. The Court must see that the offence s within the jurisdiction of the Justice, and that he has ursued his authority. The Case of Frederick v. ookup, is very strong; because there it was absolutely ecessary that the offence should be committed in the

A. D. 1778. parish, to entitle the plaintiff to recover; and must have been so proved: after verdict therefore for the plaintiff, the Court held it was cured. So here the use must have been proved at the trial, or the verdict could not have been found for the plaintiff. It might have been different, perhaps, if this ambiguity had been assigned as special cause of demurrer.—Per Cur. Rule for arresting the judgment discharged.

A. D. 1779. *Kinnersley v. Orpe and others.* 1 *Dougl. Rep. p.* 56.

On a proviso in a duchy-lease,—that it shall be enrolled with the ..litor,—the certificate of the auditor on the margin is sufficient evidence of the enrolment.—Under-leases are not within provisoes concerning assignments.

In an action of trespass, for fishing in the plaintiff's fishery, in part of the river Dove, which was tried, at the last assizes, at Stafford, before *Skynner*, Chief Baron, a verdict was found for the plaintiff, upon which a rule was obtained to shew cause why there should not be a new trial. The plaintiff had declared upon a several fishery, but was not owner of the soil, and the defendants having pleaded the general issue, and also several justifications, as servants to William Cotton, the first plea in which Cotton was mentioned had called him the said William Cotton, although his name had not before appeared on the record. At the trial, the plaintiff's counsel were unwilling to risk the case on the point, which seems still not quite settled, whether a person who has an exclusive right of fishery, but without the soil, can declare on a several fishery. The defendants, on the other hand, could not have availed themselves of their special pleas, on account of the mistake just mentioned. It was, therefore, agreed that the cause should be tried, as if there had been a count on a free fishery, and as if the pleas had been amended; and that next term, the pleadings should be so amended by consent.

A. D. 1780. *Kinnersley v. William Orpe.* 2 *Dougl. Rep. p.* 517.

A person who fishes in a fishery be-

This was an action of debt, by the owner of a fishery, for a penalty of 5*l.* under the Statute of 5 Geo. 3. c. 14.

3 & 4. for killing fish in his fishery. The defendant was the servant of a doctor Cotton, who claimed a right to the fishery in question, and an action of trespass had been brought against some of his servants, by the present plaintiff, to try the right; which action was tried at Stafford, in summer, 1779, and a verdict found for the plaintiff. The defendant applied for a new trial in that cause, but it was refused *(a)*. However, doctor Cotton not being satisfied, gave the plaintiff notice, that he should order one of his servants to fish in the same place, with the express view of procuring an opportunity to try the right again. He accordingly did so, and it was in obedience to his orders for that purpose that the defendant committed the act for which the present action was brought. This the counsel for the defendant offered to prove at the trial, and contended, that, when it should be proved, the plaintiff ought to be nonsuited, or that such an assertion of a right, was not an offence within the statute, there being an express exception in sect. 5. in favour of persons who shall have a "just right or claim."—*Perryn*, Baron, before whom the cause was tried, at the last assizes for Staffordshire, decided this point against the defendant, and refused to hear the evidence. The plaintiff produced no other proof than the record of the verdict and judgment in the former cause of Kinnersley v. Orpe, to shew his exclusive right to the fishery. This evidence was objected to, on the part of the defendant, because the former action and this were not causes between the same parties, the name of the former defendant being Thomas, and that of the present William. The Judge, however, over-ruled the objection, and held that the evidence was not only admissible, but conclusive, (both the Orpes having acted under the authority of Cotton, who was the real defendant in both causes,) unless col-

A. D. 1780.

longing to another, but to which he has a claim, for the purpose of giving occasion to an action in order to try the right, is not liable to a penalty under 5 Geo. 3. c. 14.

(a) Kinnersley v. Orpe, 1 Doug. p. 56.

A. D. 1780. lusion could be shewn in obtaining the former verdic and judgment. This was not attempted; and the Jury agreeably to the Judge's direction, found for the plain tiff. On Thursday, the 9th of November, Bower move for and obtained a rule to shew cause why ther should not be a new trial, on the ground of a misdirec tion in the several particulars above stated; and, th day, cause was shewn, by *Cowper* and *Scammerton*.— *Beaverofft* was going to answer them, but the Court tol him it was unnecessary. They thought the defendar ought to have been let in, to prove the notice by docto Cotton, and that, if that had been proved, this woul not have been a case within the act.—*Buller*, Justic observed, that, to construe it in the manner contende for on the part of the plaintiff, would be to read th clause of exception, "right and claim," instead " right or claim." The Court also thought, that th record in the former cause, though admissible evidenc was not conclusive. The rule made absolute.

A.D. 1779. *The Earl of Aylesbury v. Pattison.* 1 *Dougl. R. p.* 2

A lord of a hundred, or wapentake, cannot grant a deputation to a game-keeper.

This was an action of debt against the defendant, recover six penalties, on the Statute of Ann. c. 14. f keeping a gun to destroy game; for using a gun for th purpose; for keeping a setting-dog; for using a settin dog; for exposing a grouse to sale; and for exposi a partridge to sale; not being qualified. The cau was tried, at the last assizes at York, before *Will* Justice, and a verdict found for the plaintiff on one the counts, subject to the opinion of the Court, on t following case, *viz.* "that William Marwood, esq. w lord and chief bailiff of the liberty, wapentake, or hu dred, of Langbaurgh, in the North Riding of the coun of York. That the said William Marwood and l servants, and the servants of those under whom

claimed, had used to kill game on the manor of Whorleton, which is within the said wapentake, and also on all the rest of the said wapentake. That the plaintiff was lord of the said manor of Whorleton, and had usually appointed a game-keeper within the said manor, for the purpose of preserving the game, and had a game-keeper at the time of the facts committed as laid in the declaration. That the said William Marwood, as lord and chief bailiff of the said wapentake, on the 21st day of July, 1777, granted a deputation to the defendant (his menial servant), who was killing game at the time in the declaration mentioned, and did kill one grouse within the said manor of Whorleton for the said William Marwood, by his order, and for his immediate use; which deputation was in the words following, *viz.* "I William Marwood, esq. lord and chief bailiff of the liberty, wapentake, or hundred of Langbaurgh, in the North Riding of the county of York, do hereby nominate, authorize, and appoint, my servant Michael Pattison, to be my game-keeper of and within my said liberty, wapentake, or hundred of Langbaurgh, during my pleasure only, with full power, licence, and authority, to kill any hare, pheasant, partridge, or any other game whatsoever, in and upon all and every or any part of my said liberty, wapentake, or hundred of Langbaurgh, for my sole and immediate use and benefit, and, also, to take and seize all such guns, bows, greyhounds, setting-dogs, lurchers, or other dogs intended for killing of hares, ferrets, tramels, lowbells, hays, or other nets, harepipes, snares, or other engines intended for the taking and killing of conies, hares, pheasants, partridges, or other game, as within the precincts of my said liberty, wapentake, or hundred of Langbaurgh, shall be used by any person or persons, who, by law, are prohibited to keep or use the same. Given under my hand and seal this 21st day of July, 1777. That A. D. 1779.

A. D. 1779. the said deputation was duly registered with the clerk of the peace. That the said William Marwood had granted no deputation before that given to the defendant." The question for the opinion of the Court, upon the forgoing case, was, "Whether the defendant had any right or authority to kill game upon the manor of Whorleton?" — *Davenport*, for the plaintiff, besides drawing many arguments from the nature of wapentakes and hundreds, and the ancient statutes concerning them, contended, that the statutes authorizing the appointment of game-keepers, do not extend to the lords of a wapentake or hundred. That the words of 22 & 23 Car. 2. c. 25. are, "that all lords of manors or other royalties, not under the degree of an esquire, may, by writing under their hands and seals, authorize one or more game-keeper or game-keepers within their respective manors or royalties" (*a*). That it then gives the game-keepers, so appointed, authority to seize such guns, bows, &c. as, within the precincts of such respective manors, shall be used by persons not qualified. That the word "royalty" was not repeated in the last part of the clause, which shewed that it was used as synonymous to manor. That, by the Statutes of 5 Ann. c. 14. 9 Ann. c. 25. and 3 Geo. 1. c. 11. which use the words "lords and ladies of manors," without any other description, it was manifest that they only were meant by the legislature to have the power of granting deputations. That honours, baronies, seigniories, and fees, are words applied, in different parts of England, to the same sort of property as manors, one of them generally comprehending several or many manors. But that the lord of a wapentake or hundred was to be considered only as lord of the hundred court, or court-leet. That it would not be argued that a sheriff could grant such a

(*a*) Sect. 2.

deputation for his county; and, if not, how could a lord of a hundred or wapentake, which is only part of the county, and taken out of it? That if this deputation were sustained, there would be two game-keepers in the same manor; for that Lord Aylesbury had appointed one, which he certainly had a right to do; but that, by 9 Ann. c. 25. only one game-keeper could be appointed within any one manor. That as to the usage stated in the case, that might be evidence of a prescriptive free warren, so as to excuse a trespass, but it could not enable Mr. Marwood to depute another to kill game. —*Chambre*, for the defendant, argued, that the question depended upon the construction of 22 & 23 Car. 2. c. 25. and of 5 Ann. c. 14. That all wapentakes were originally in the crown, and must be derived from it, and that courts are incident to them, as to manors. 2 Roll. Abr. 73. That they therefore are properly royalties, and that, in the Statute of 14 Ed. 3. c. 39. the owners of wapentakes are called lords; so that Mr. Marwood was rightly styled the lord of this wapentake. That Davenport had said, that "royalty" in the Statute of Car. 2. was synonymous to "manor," but that the words were "manors, or other royalties." That nothing could be inferred from the omission of the word "royalty" in the Statute of 5 Ann. That acts in pari materiâ are to be explained by one another, and that act must be understood to extend to all who are entitled to appoint game-keepers by the Statute of Car. 2. —Lord *Mansfield*. All acts in pari materiâ are to be taken together, as if they were one law. In the Statute of Car. 2. the words, "other royalties," are used, but that must mean royalties of the same nature with manors. If royalties of a higher nature had been meant, the statute would have begun with them. The reason why this word was used in the Act of Car. 2. was, because such royalties go by different names in different

A. D. 1779.

A. D. 1779. parts of the kingdom, as honours, baronies, fees, &c. But in the Act of 5 Ann. c. 14. the words are only "lordship or manor" (*a*), and the Acts of 9 Ann. and 3 Geo. 1. recite the others, and only mention "lords and ladies of manors." The postea to be delivered to the plaintiff.

(*a*) Sect. 4.

The King v. Rough. 2 East's Pl. Cr. p. 607.

John Rough's Case, Surrey Lent Ass. 1779, MS. Buller, J. 2 MS. Sum. 251. 3 MS. Sum. 13. and MS. Crown Cas. Res.

John Rough being convicted on an indictment for stealing a pheasant, value 40*s.* of the goods and chattels of H. S.; all the Judges on a second conference in Easter Term, 1779, after much debate and difference of opinion, agreed that the conviction was bad; for in cases of larceny of animals feræ naturæ, the indictment must shew that they were either dead, tame, or confined; otherwise they must be presumed to be in their original state; and that it is not sufficient to add "of the goods and chattels" of such an one.

A. D. 1780. *The King v. Wheatman. Douglas' Rep. p. 345.*

In a conviction on the Game Laws, the information must negative, specifically, every one of the qualifications in the Stat. of 22 & 23 Car. 2. c. 25.

This was a rule to shew cause, why a conviction for using a gun should not be quashed. The objection was, that the information, as set forth in the conviction, did not alledge specifically, that the defendant was "not owner or keeper of any forest, chase, park, or warren." It was contended, that it is necessary to state in the information, particularly, that the defendant had none of the qualifications enumerated in the Statute of 22 & 23 Car. 2. (*a*). The Case of Rex v. Maurice Jarvis (*b*), was relied on, as a decisive authority in point. On the other side, it was argued, that it is sufficient, if the want of every one of those different qualifications appear in any part of the record, and it did

(*a*) C. 25. Sect. 3.
(*b*) H. 30 Geo. 2. 1 Burr. 148.

appear by the evidence, as set forth, that the defendant had none of them.—*Chambre*, in support of the rule.—*Dayrell*, for the prosecutor.—Lord *Mansfield*. This will not do. The defendant can be convicted only of the charge in the information, and that must be sufficient to support the conviction.—*Ashhurst*, Justice. The evidence must prove, but cannot supply any defects in the information (*a*). The rule made absolute. A. D. 1780.

(*a*) And, though the information must, the evidence needs not negative specifically all the qualifications. Rex v. Crowther, B. R. H. 26 Geo. 3. 1 T. R. 125. 127.

Hundson's Case. 2 East's Pl. Cr. p. 611. A. D. 1781.

An indictment against John Hundson on the Statute 5 Geo. 3. c. 14. charged him with unlawfully entering a garden of A. T. adjoining and belonging to her dwelling-house, in which was a certain pond used for keeping fish, and without A. T.'s consent, with a certain net stealing and taking out of the said pond a certain quantity of live gold and silver fish, of the goods and chattels of the said A. T. against the form of the statute. On evidence it appeared that the pond out of which the fish were taken adjoined to the house, and was about twenty yards in length and ten in breadth; that gold fish and other fish were kept in it, which were usually fished for with a hook and line. It was objected, that fish in an open pond were feræ naturæ, unreclaimed, and not the property of any particular person, as they were laid to be in the indictment. In answer to which a distinction was taken on the part of the crown, that this was not an indictment for a felony, but only for a misdemeanor on the statute (*a*), though the punishment directed was transportation. In Easter Term, 1781, all the Judges held the indictment good, the case being fully brought within the Stat. 5 Geo. 3. without the allegation that the fish were the goods and chattels of any person; and therefore that part of the

Hundson's Case, O. B. 1781, cor. Willes, J. MS. Buller, J. 2 MS. Sum. 281 & MS. Crown Cas. Res.

(*a*) It is observable, however, that the stat. uses the word steal.

A. D. 1781. indictment was surplusage. But if the indictment had been at common law for felony, it was the opinion of some that it should have described what sort of a pond it was, that it might appear on the face of the indictment that taking fish out of such a pond was felony.

A. D. 1782. *Rex v. Hartley. Caldecott's Rep. p.* 175.

Keeping dogs, &c. of the kinds enumerated, is, as well as using them, an offence against the Game Laws; and evidence prima facie of the purpose for which they are kept. To say a dog, called a greyhound, is a sufficient averment of his being a greyhound. See 1 Stran. 496.

Under the Stat. 5 Ann. c. 14. for the better preservation of the game, the defendant was convicted for keeping and using a greyhound to kill and destroy the game. This conviction, upon the information of John Bottomley of the parish of Hildwick, in the West Riding of the county of York, labourer, before *Johnson Atkinson Busfield*, esq. one of the Justices, &c. stated, that John Hartley of the parish of Thornton, in the West Riding of the county of York, "did at the parish of Thornton aforesaid, within the West Riding aforesaid, within three months now last past, viz. &c. keep and use a certain dog, called a greyhound, to kill and destroy the game, &c." And the conviction farther stated, that on the 24th day, &c. &c. one credible witness, to wit, John Foulds of the parish of Carleton, in the West Riding aforesaid, yeoman, cometh before, &c. and being then and there sworn, &c. deposeth, &c. in the presence of the said John Hartley, that "within three months next before information was made before me the said justice, by the said John Bottomley as aforesaid, to wit, on the 20th day of September aforesaid, in the 21st year aforesaid, the said John Hartley at the parish of Thornton aforesaid, in the West Riding aforesaid, being a person not then having lands, &c. &c. did keep and use a certain dog, called a greyhound, to kill and destroy the game: whereupon all and singular the matters, things and evidences abovementioned being fully heard and understood by the said John Hartley, &c. &c. and for as much as the said John Hartley doth

not offer, alledge, or say any thing, or produce or offer any evidence in answer to the said information, evidence, matters, things and premises, or any of them charged on him as aforesaid, it manifestly appears to me, the said justice, that the said John Hartley is guilty of the premises in manner and form aforesaid above laid to his charge. Wherefore I the said justice, upon the oath, &c. do adjudge that the said John Hartley, on the 20th day of September aforesaid, in the 21st year aforesaid, at the parish of Thornton aforesaid, in the West Riding aforesaid, did keep and use a certain dog, called a greyhound, to kill and destroy the game, and that the said John Hartley had not then any lands, &c. And thereupon I the said justice, &c. do convict, &c. *J. A. Busfield.*—On a rule to shew cause why this conviction should not be quashed, *Chambre* took two objections: 1. That it was not fully and sufficiently stated, that there had been an using of the greyhound, i. e. how and in what manner, and for what purpose. 2. That it was not expressly and positively averred, that he had kept and used a greyhound at all. 1. He contended, that it was an established rule in convictions, that every material fact should be directly averred, and the evidence particularly stated: that in the present instance the manner of using, or purpose for which used, was so far from being particularly set out, that the conviction had only at most pursued the language of the act, viz. that the greyhound was kept "to kill and destroy the game:" that this was not sufficient, and that it was necessary to set out the evidence at large, he relied upon two authorities: 1. The Case of (*a*) the King v. Killet, Clerk; which was a conviction of a clergyman under Stat. 19 Geo. 2. (*b*) for neglecting to read the act against profane cursing and swearing: that in this con- A. D. 1782.

(*a*) E. 7 G. 3. 1767. 4 Burr. 2003.
(*b*) C. 21. s. 13.

A. D. 1782. viction the information fully charged the offence, specifying that the defendant was parson of the parish, his officiating as such, his neglecting to read, &c. and that the same, as set forth, was duly proved; but that the Court held, that it ought to have appeared to them, from the nature of the evidence specially set forth, that the defendant was guilty: and that the conviction was accordingly quashed. That in the other Case (*a*), the King v. Sparling, which was a conviction under the same stat. (*b*) for profanely cursing and swearing, the conviction set forth the evidence to be, that the defendant profanely swore fifty-four oaths and one hundred and sixty curses, &c. but the Court held, that it could not in that form be supported, "the oaths and curses not being set forth: for that what is a profane oath or curse is matter of law, and ought not to be left to the judgment of the witness." That here the evidence is only, that the defendant kept a greyhound for killing the game: that therefore the witness here in like manner takes upon himself to swear to the law, and to judge what is game: and that he ought to have specified what the defendant did, or what game he destroyed; the particular act done, or the species of animal meant to be destroyed; as by so doing he would have supplied materials to enable those to form a judgment, whom the law considers competent to judge. 2. That it is not expressly and positively averred, that the defendant had kept and used a greyhound at all; but only that he kept and used a certain dog called a greyhound: that it might be called so, and yet be another kind of dog: that it might partake even of the nature of a greyhound; but that the act (*c*) clearly describes one par-

(*a*) II. 8 G. 1. Str. 497.
(*b*) S. 1.
(*c*) The words of the act are: if any person shall, &c. keep or use any greyhound, setting-dogs, hayes, lurchers, tunnels, or any other engines to kill and destroy the game, &c. s. 4.

ticular species of dogs: that it might be an Italian grey- A. D. 1782.
hound, and unfit for the purposes prohibited by the act: and that it had been adjudged, that keeping a hound, though for the destruction of the game, could not be punished under this statute (*a*).—*Wilson, J.* in support of the conviction insisted, that the reason of the thing by no means justified the authorities that had been cited; and therefore that in a formal objection, where all the authorities were not uniform, the Court would not, if not satisfied upon principle, avoid an act of a magistrate, which was not impeached upon the merits; especially as by so doing they would inevitably subject him to an action, a distress having been taken under the authority of this conviction; that were an act describes an offence, there seems to be no method so accurate and so little exceptionable as to follow the words of the legislature: neither in the present case, in which the penalty was the same whatever the sort of game might be, could any objection arise (*b*) from the inability of the magistrate under a general charge, to proportion the punishment to the particular nature of the offence: that there was but one species of game that a greyhound could kill: and that independent of the use, the keeping only for these purposes, of any dog prohibited by the statute, was sufficient to constitute the offence; for the statute says in the disjunctive, keep or use; and that, unless from the particular circumstances attending the dog, or other proofs adduced, the contrary could be shewn by the defendant, the law would infer that such dog was kept for such purposes: that in the Case of (*c*) the King v. Filer, it was holden upon this statute, that, as it ran in the disjunctive, the bare keeping of a lurcher is an offence within it: that the keep-

(*a*) H. 13 G. 2. Hooker v. Wilks. 2 Str. 1126.
(*b*) Vide Rex v. Chapman, E. 28 G. 2. 1755. Sayer. 263.
(*c*) H. 8 G. 1. Str. 496.

A. D. 1762. ing of any of the things enumerated by the legislature, was therefore of itself an offence: that things indeed, which were only constructively included in the act, as a gun under the word "engines," must be expressly shewn upon the face of the proceedings to have been kept for the purpose of destroying the game; because a gun may be used for other purposes, as the protection of a man's house: that to this last doctrine, which was recognized in the Case of (*a*) the King v. Gardner, it was added by the Court, that "a gun differs from nets and dogs, which can only be kept for an ill purpose:" and that the present case being that of one of the instances enumerated, nothing more was necessary to be set out.—*Chambre*, in reply, urged, that the cases cited against him had all gone upon the form of the adjudication; but that his objections went to the state of the evidence: that it was true, that it had been said in the King v. Gardner, that the purpose for which dogs were used, need not be set out; but that was not the point of the case; that the question there was, whether it was necessary to set out the purposes for which a gun was used: that the Court held it was, because a gun might be used for other purposes, as the protection of a house: and that the principle therefore of this decision supported his argument; for that dogs are more commonly kept for this very purpose, the protection of houses, than guns are.—Lord *Mansfield*. Convictions must certainly be precise, that the Court may see whether the offence committed falls within the jurisdiction of the magistrate: and, whatsoever the consequences are, they must be quashed if not so. In this act there are two offences described; a keeping and an using; and the legislature mean, that there may be a keeping to destroy, &c. which is not of necessity to be proved by an using for that purpose. If it were so, it would be tau-

(*a*) Tr. 11 G. 2. 2 Str. 1098.

A. D. 1782.

:ologous; for such evidence would be a proving of the other offence. The keeping therefore of a thing prohibited being an offence under the act, it is necessarily primâ facie evidence of a keeping for the purpose prohibited; and it is incumbent upon the defendant to shew that it is kept for another purpose; as that in the present case, it is a house-dog, a favourite dog, or a particular species of greyhound. The description cannot be more precise, unless some particular instance of using is shewn; which, if keeping of itself constitutes an offence, cannot be necessary. As to the other objection, that the averment in this conviction is defective, in stating only that this was a dog *called* a greyhound, I think it positive enough. It must mean the dog of that species, generally known in this country.—*Willes*, J. The Case of the King v. Gardner is in point, and must govern this. There is hardly another use to which this species of dog can be applied.—*Ashhurst*, J. There is no doubt but that, under the common acceptation of the words used in the conviction, this is a sufficiently apt description of a greyhound: and it is not necessary in convictions to adhere to the letter.—*Buller*, J. concurring. Rule discharged and conviction affirmed. Vide the Case of Rex v. Thompson, Tr. 27 Geo. 3. 1787. 2 Term Rep. 18.

Lowndes, Esquire, v. Lewis, Clerk. Cald. R. p. 188.

A life-estate of less then 150l. per annum, is not a qualification to kill game.

This was an action of debt on the Stat. 5 Ann. (*a*) for the better preservation of the game, and the defendant pleaded the general issue. At the last assizes for the county of Oxford, the cause was tried before *Heath*, J.; and the plaintiff obtained a verdict for two penalties upon two counts, one for keeping, and the other for using, a greyhound, upon the ground that the defen-

(*a*) C. 14. s. 4.

A. D. 1782. dant, who had a living of 100*l.* per annum, had not shewn an exemption under the Stat. 22 & 23 Car. 2.; but with leave for the defendant to move to set aside the verdict, and enter it for the defendant. And now upon such motion it appeared from the Judge's report, that the points of law which arose out of the facts in proof at the trial, and which were meant to be submitted to the judgment of the Court, were, 1. Whether a person, having an estate for life of 100*l.* per annum, is qualified to kill game? 2. Whether a vicar, in respect of his church, has an estate of inheritance in him, or an estate for life only? The first and most general question depended upon the words of the act (*a*), which were, "that every person not having lands and tenements, or some other estate of inheritance in his own or his wife's right, of the clear yearly value of one hundred pounds per annum, or for term of life, or having lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of one hundred and fifty pounds, is hereby declared to be a person, by the laws of this realm, not allowed to have or keep for himself or any other person, any greyhound, &c.:" and the principal difficulty upon the argument seemed to be, whether the words "or for term of life," were properly referable to the first or last branches of the sentence, which created the exemption?—*Howorth*, *Bower* and *Clerke* shewed cause against the rule to enter the verdict for the defendant: and *Howorth* insisteth, that, the interest of a parson jure ecclesiæ being no more than an estate for life, such property would not exempt him from the penalties of the Stat. of 2 Ann.: that it was necessary that such an ecclesiastical estate should amount to 150*l.* per annum: that it was the obvious intention of the legislature, when they passed the Stat. 22 & 23 Car. 2. to make a distinction between estates of inheritance, and estates for lives

(*a*) C. 25. s. 3.

nd years: but, supposing there were any doubt upon he words of the Stat. of Car. 2. the Statutes 1 Jac. and Jac. being in pari materia must be taken as explanatory, and would remove the difficulty: that those tatutes must have been consulted at the time, and that hey make an express difference between the qualifications ecessary to an owner of the inheritance and a mere enant for life; and that the words (*a*) of the two acts were so clear and marked, and the consequences to be lerived from them so plain, that they could not be farher elucidated by argument.—*Bower* insisted, that a lue consideration of the several statutes and the general aw upon this subject would not only fortify the contruction above contended for; but would go a great way to shew, that no spiritual person, unless of such lignity as to have an estate of fee-simple in his church, could have any qualification to kill game: that such qualifications were merely positivi juris, and that no subject whatsoever is by common law so entitled: that strictly such title could only exist by grant from the crown: that the only statute which had ever given a positive right to any spiritual person to use these sports, was that of 13 R. 2. (*b*): but that that statute, so far as it conferred this right, is repealed by the Stat. 22 and 23 Car. 2.; which declares that they, who have not A. D. 1782.

(*a*) The words of the first stat. are: "all and every person and persons which shall have or keep any greyhound, &c. except such person or persons which shall be seised in their own right, or in the right of their wives, of lands, tenements, or hereditaments of the clear yearly value of ten pounds by the year or more, over and above all charges and reprises, of some estate of inheritance, or of lands, tenements, or hereditaments in his own right, or in right of his wife, for term of life or lives of the yearly value of thirty pounds, over and above all charges and reprises, &c. shall be committed, &c." C. 27. s. 3. The words of the other Statute 7 Jac. are: "it shall be lawful to and for every freeholder which is or shall be seised in his own right, or in the right of his wife, of lands, tenements, and hereditaments to the clear yearly value of forty pounds and more by the year, over and above all charges and reprises, of some estate of inheritance, or of lands, tenements, and hereditaments, in his own right, or in the right of his wife, for term of life or lives of the yearly value of fourscore pounds, over and above all charges and reprises, &c." c. 11. s. 7. and vide Stat. 1 Jac. c. 27. s. 6.

(*b*) C. 13.

A. D. 1752. one hundred pounds per annum, in their own or their wife's right, are persons by the law of this realm not allowed, &c.: that a vicar or (*a*) rector has nothing in any such right, but holds only (*b*) jure ecclesiæ: that the inheritance is certainly (*c*) in abeyance: that he has not the mere writ of right, because he has not the entire fee (*d*): but only the special remedy of juris utrum (*e*): that a bishop indeed (*f*) had the fee in him; but that a rector had only an estate for life and that only in the right of his church; and, if he is intrusted with some of the remedies given to tenants in fee, it is for the benefit of the church only: that it was also observable upon this very right given to the clergy by the Stat. of R. 2. that, though its provisions extended to all laymen, and even included artificers and labourers, "who had lands or tenements to the value of forty shillings by year," it enacts, that no priest nor other clerk, if he be not advanced to the value of ten pound by year, shall have or keep from henceforth any greyhound, &c.:" that the insisting upon a qualification of ten pounds per annum at that time and according to the then value of money amounted in most instances to a prohibition: that it certainly must have been so meant; and that the reason was, that by the canon law (*g*) all clergymen were prohibited from using these sports. That, as the statute of the first and seventh of King James had been insisted upon as shewing that the legislature had uniformly made a distinction between estates of inheritance and estates for life, with respect to the annual value necessary to convey the right in question, the Statute of (*h*) 3 Jac

(*a*) There had been some mistake in the state of the question in this cause, the defendant being in point of fact Rector of Charlton in the county of Wilt.
(*b*) Litt. s. 644.
(*c*) Litt. s. 646.
(*d*) Vide Fitz. N. B. 49.
(*e*) Booth, 221.
(*f*) Litt. s. 645.
(*g*) Vide Blackst. Comm. 2. 413.
(*h*) The words of the act are, "If any person or persons, not having an

which enabled any person, having lands of 100*l.* per annum in fee or for life, to seize and keep any gun used, &c. by any person not having, &c. might be cited on the other side to shew, that in some instances at least this distinction was not preserved, but that the owners of these estates, though different in quantity of interest, were put exactly upon the same footing: and he insisted, that, in judging of this law and drawing consequences from it, the object of the legislature in making it ought to be had in view: that this act had not passed so much with a view of vesting any rights in these two classes or descriptions of men, as for the purpose of providing easier remedies to prevent the invasion by others of rights, which were by these classes of men considered as completely vested in them already; or at least that all legal pretence of claim in those, against whom it was levelled, had long been extinguished: that, if by these means it would become more hazardous to offend against the Game Laws, and consequently these sports, of which our ancestors were so tenacious, would be more effectually protected and exclusively enjoyed, it was within the very same rule of policy not to be too nice in drawing the line of qualification of those, who were empowered to seize the arms of malefactors, the strong term used in the act. As to the words of the Statute of Car. 2. "or for term of life," and that they relate to leasehold terms for years of 150*l.* per annum, and not inheritances of 100*l.* he urged, that the abstract of Ld. Ch. Baron Comyns, who, when he speaks from himself, is a very high authority, confirmed the construction insisted upon by the plaintiff: in his Di- A. D. 1782.

manors, lands, tenements, or hereditaments of the yearly value of forty pounds, or not worth in goods or chattels the sum of two hundred pounds, shall use any gun, &c. that then any persons, having lands, tenements, or hereditaments, of the clear yearly value of one hundred pounds in fee-simple, fee-tail or for life, in his own right, or in the right of his wife, may take from the person or possession of such malefactor or malefactors, and to his own use for ever keep, such guns, &c." c. 13. s. 5.

A. D. 1782. gest (*a*) he explains it thus: "By the Stat. 22 and 23 Car. 2 c. 25. persons, not having an inheritance of their own or their wife's of 100*l.* per annum, or 150*l.* per annum, in an estate for lives or years above 99, &c. shall not keep or use, &c.:" and that the act is also stated in the same way in the Case of (*b*) Bennet v. Talbot.—*Adair*, Sergeant, in support of the rule to enter the verdict for the defendant, insisted, that the words of the act, without calling in aid from any other quarter, clearly and sufficiently explained themselves: that it was impossible to throw back the words "or for term of life," to the clause respecting leases: that though it might be said that those words were awkwardly placed, from the circumstance of their having the qualifying sum, the 100*l.* interposed between them and the estate of inheritance, yet it would be both grammar and sense to connect them with the first branch of the sentence, which describes the inheritance; whereas the next set of words are, upon every principle of grammar, plainly the introduction of a new branch of a sentence, and in construction detached from the former: that the words, "or having," in this clause answered and stood in opposition to the words, "not having," in the first and introductory clause: that this was therefore a new description in a new sentence, followed by a new value: and consequently that upon this ground a life estate of 100*l.* per annum was a legal qualification to kill game. But, independent of grammatical niceties, he farther insisted, that in the present circumstances it was not reconcileable to principles to connect a clause, respecting estates for life, with that to which, according to legal maxims, it bore no relation: that things of the same nature and legal character must have been

(*a*) Vol. 4. tit. Justices of Peace, p. 71.

(*b*) M. 8. W. 3. 1696. 5 Mod. 307. It appears either to have been so stated at the bar, or was perhaps the idea of the Reporter: it is not a point made in the case.

intended by the legislature to have been classed together: that the most marked distinction in the law is between estates of freehold, though of no higher a description than pur auter vie, and estates less than freehold, of whatever duration and extent: that upon this principle the act ought to be interpreted; and to read this clause conformably thereto, would in every sense be the most natural reading; for that the words "or having," not used in the preceding clause, which is the subject of contest, plainly denote, that, when introduced, a new subject is taken up; that that point is the true division of the sentence; and that the latter clause could not mean to comprehend or refer to either of the preceding descriptions. He also contended, that the argument on the other side, that no spiritual preferment could give a qualification, and which was founded upon the words, "in his own or his wife's right," in the first branch of the sentence, do not apply, unless the words in contest, "or for term of life," are connected with and form a part of the same branch: but that the argument by its very aim referred itself there; and that, if it was properly so referable and not to the latter branch, it was the sole question between the parties; and 100*l.* per annum must be a qualification for a clergyman: that the estate of a parson being "to him and his successors," is but in other terms an estate in fee; that the word "successors," when applied to a parson in his politic capacity, is equivalent to the word "heirs," in his natural; and that this is as large an estate as any corporation has. He observed, that Mr. *Howorth* had not ventured to comment upon, or to offer his construction of, this act of parliament, but had relied entirely upon the language of former acts in pari materia; which, as he argued, must have been in the contemplation of the legislature at the time the present act passed: and the Sergeant insisted, that the in- A. D. 1782.

A. D. 1782. ference from thence was altogether in favour of the defendant; for, if those acts then lay before the legislature, if they were apprized of the distinctions which those acts made, and have omitted them, or even imperfectly expressed them, it must be presumed that they were purposely omitted; and that, in the construction of a restrictive and penal law, the party prosecuted is entitled to the advantage of either the slip or the intention. That, with respect to the authorities, much stress ought not to be laid upon the abstract from Comyns's Digest: that an abstract materially differs from an opinion: that the first is at most a cursory view of a single passage or section: that the other is the result of a full consideration of the whole subject: that in either view he should oppose to it the authority of a writer, who appeared to have well weighed what he had delivered; and that it is said by Mr. Justice *Blackstone* in (*a*) his Commentaries, that "the qualifications for killing game are, 1. the having a freehold estate of 100*l.* per annum; 2. A leasehold for ninety-nine years of 150*l.* per annum, &c.": and that, as to the case cited, it was in an anonymous author, and no judicial opinion. That the usual form of convictions upon the Stat. of Anne shewed, that the Act of Car. 2. was understood in the sense contended for by the defendant.—Lord *Mansfield*. No. It is quite otherwise. His Lordship then read the form as it is given in (*b*) *Burn*; and observed, that it appeared from thence, that, as the word "having" in the last member of the sentence is there omitted, the words "or for term of life," which form the preceding member, are necessarily connected with and carried over to the last member of the sentence: and consequently, according to the grammatical construction of this precedent, a tenant for life must have an estate to the amount

(*a*) Vol. 4. 175.
(*b*) Vol. 2. 328.

of 150*l.* per annum to qualify him to kill game. The clause, as it stands in the act, is not grammar. It is by some slip made nonsensical. The word "having" must be rejected; or the consequence is, that the having of a term must, as the act is worded, operate as a (*a*) disqualification: an impossible sense in any way of considering this statute. But leave out this word, (and for the above reason it cannot be retained,) and all is clear.—*Willes*, J. Construing this act, as it ought to be construed, by itself, and reading it without adverting to what might or might not pass at the time in the minds of the framers of it, it plainly gives, agreeable to the general understanding and practice, a qualification to all such as own a freehold of 100*l.* per annum. With no other title the clergy have always exercised this right, and ought not to be deprived of it. In the clause of the act, which is the subject of debate, there are two distinct branches of sentences, the sense of each of which is governed by the word "having." The break or pause is, where that word is taken up a second time; and there a new direction, a new sense and sentence, begin. This construction does no violence by rejecting any thing; and I cannot consent by another construction to extend the penalties of the act farther. The forms of convictions, when once settled, whatever was the particular view upon which they were at first drawn, are copied and continued afterwards without thought or consideration. If, previous to the introduction of this form in any book of precedents, the particular case now before the Court had ever been made the subject of discussion, the form must have been allowed to have weight: but no such action or prosecution was ever heard of before: on the contrary, the usage has been for persons in possession of an estate for life of A. D. 1782.

(*a*) For instance, "Every person not having some estate of inheritance, or for life, or having a lease for any term of years, is declared to be a person by the laws of this realm not allowed to keep greyhounds, &c."

A. D. 1782. 100*l.* per annum, constantly to exercise this privilege. It was this usage, therefore, which spoke the sense of mankind upon the subject, and ought to prevail. Whatever may be the good sense of the thing, or the probable intention of the legislature, I think, that upon legal principles, if a penal act is defectively penned, it cannot be carried into execution. Without looking into the authorities cited, this is at present strongly the impression of my mind.—*Ashhurst*, J. The act, as it stands, is nonsense. This subjects us to the necessity of adding or rejecting something. "Having," therefore must, in the last member of the clause, be rejected, or "not" must be added to it, to make the whole intelligible either way.—*Buller*, J. This case seems to me to admit of no doubt, when the question is considered with reference to former acts in pari materia; and if we must either reject, or add, or transpose words in this act, to obtain a clear and consistent meaning, under such circumstances we can do no other than resort to former statutes: and each of those cited in the reign of King James, not only require in the case of estates for life a higher qualification than in the case of inheritances, but even to a double and treble amount. But upon the act itself the construction must be, that estates for life are not equivalent to estates of inheritance, or the whole of the first clause is nugatory, and altogether rejected in effect; as the second, which is having an estate of freehold, would have included it. The passage in Comyns, the case in 5 Mod. and the printed form of convictions, all strongly shew the general understanding upon the subject; and, added to the sense of the legislature in the acts pari materia, afford to my mind an unanswerable argument.—Lord *Mansfield*. We will think of it; and should we change our opinions, we will let you know. In the mean time let the rule be discharged. It was never mentioned again.

Wetherell, Esq. v. Hall. Cald. Rep. p. 230. A. D. 1782.

This was an action of debt, upon the Stat. 5 Ann. (*a*) for the better preservation of the game. The declaration consisted of several counts; the second of which charged the defendant, with using a certain engine called a gun, to kill and destroy the game, not being a person qualified so to do. The defendant pleaded the general issue; and the cause was tried before *Eyre*, B. at the last assizes for the county of Durham; when the Jury found a verdict for the plaintiff upon the above count, subject to the opinion of the Court upon the following case: That the defendant, upon his marriage with his present wife, became seised in her right of an estate of inheritance, part of which was copyhold, and held of the manor of Bondgate in Darlington, in the county of Durham; which, at the time of committing the offence mentioned in the declaration, and before, were together of the clear yearly value of one hundred and three pounds. But it farther appeared, that the said defendant and his wife, before the committing of the offence, to wit, on the tenth day of May, one thousand seven hundred and eighty, duly surrendered a close of land, parcel of the said copyhold estate, unto Robert Kelsey and his sequels in right, upon condition, that if the said Robert Hall and Mary his wife, their sequels in right, executors or administrators, should and did well and truly pay or cause to be paid unto the said Robert Kelsey, his executors, administrators or assigns, the full and just sum of four hundred pounds of lawful money of Great Britain, with legal interest for the same, at or upon the tenth day of November then next, that then and upon such payment in manner aforesaid the said Robert Kelsey and his sequels in right should and would resurrender the said premises unto and to the use of the said Robert Hall and Mary his wife and their

An equitable as well as legal estate gives a qualification under the Game Laws: but the clear value of the necessary estate means the value, clear at least of all mortgages or incumbrances created by the owner, or those under whom he claims.

(*a*) C. 14. s. 4.

A. D. 1782. sequels in right at their proper costs and charges accordingly; and that the said Robert Kelsey was upon the said tenth day of May admitted thereto; and the said mortgage still continued upon the same; and that the said close, at the time of committing the offence and before, was of the clear yearly value of fourteen pounds, parcel of the said one hundred and three pounds; and that the interest of the said mortgage had been regularly paid, and the mortgagee had not entered into possession of the copyhold close mortgaged to him. The question reserved for the opinion of the Court was, whether the defendant at the time of committing the offence was duly qualified to use engines to kill and destroy the game?—*Lambe* for the plaintiff contended, 1. that a legal estate of 100*l.* per annum was necessary to constitute a qualification to kill game: that here the defendant had no more than an equitable estate in the part mortgaged: that such estate cannot be taken notice of by a court of law in the construction of an act of parliament: that by the Stat. (*a*) 22 and 23 Car. 2. an estate of an annual value less than 150*l.* must be of an inheritable nature to give a qualification: that the defendant, so far from having an interest of this character and description, was only tenant at will to the mortgagee.—But Lord *Mansfield* intimating that it would be difficult to support this ground of argument—Mr. *Lambe* insisted, 2. If an equitable estate were considered as giving a qualification, that still, in point of annual value, the defendant had not, upon the true construction of the act of parliament, an estate sufficient to qualify him. That the words of the act were, "the clear yearly value of 100*l.*:" that this could not mean

(*a*) All and every person and persons not having lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the clear yearly value of one hundred pounds per annum, &c. are hereby declared to be persons by the laws of this realm not allowed to have or keep for themselves, or any other person or persons, any guns, &c. c. 25. s. 3.

the gross value of the estate, but must mean the net income: that such it could not be, if, by incumbrances of any sort, the issues and profits were brought within that sum: that the object of the legislature was, to entitle those only, whose independence, arising from the produce of their lands, would enable them to use these rights for the purpose of amusement: that, upon comparing the value of land at the time this law passed with its present value, it would be found that the measure of this independence had already been reduced much below the intention of the legislature: that if the construction contended for were admitted, no degree of interest whatsoever in the produce of lands would be necessary, and the intention of the legislature must be totally frustrated; inasmuch as the holder of an estate, whether he charged it himself to its utmost value or had it transferred to him under such charge, without having, or without ever having had, an income arising out of land to the amount of one farthing, must in such case be entitled.—Lord *Mansfield* called upon the other side.—*Chambre* for the defendant stated the only question to be, whether the interest of the mortgage was to be considered as such a reduction of the annual value of the estate as would destroy the defendant's qualification? and he contended, that this was a penal law: and would not therefore be extended by construction: that it was besides a general law and in its terms does not require the party to have a legal estate: that the words of the act are "not having, &c.;" within which words an equitable estate is sufficient: that in deciding on points of this nature the substance ought principally to be regarded: that the cestuy que trust was substantially the owner: that Courts of law in many instances advert to the practice of a Court of equity; as in the common case of a trustee, who is not permitted to eject his cestuy que trust. See then how a mortgager is con- A.D 1782.

A. D. 1782. sidered there? The mortgage is in substance a specialty debt, the equity of redemption is considered as real estate, and descends to the heir of the mortgager; who is considered as a debtor, and his personal assets liable in the first instance to discharge the mortgage: and, though at law the heir of the mortgagee takes a legal estate, yet the personal representatives are considered as entitled to take the benefit and receive the mortgage debt. He farther insisted, that a mortgagee can never get possession, if the mortgager is ready to pay the money: that by statute (*a*) it may be paid impendente lite: and that, if the legal estate only were to be regarded, an estate of a thousand pounds a year, mortgaged in fee for one hundred pounds, would not furnish a qualification. That the only question that remained was, whether the interest of the mortgage money was to be considered as an outgoing, that would reduce the value of the estate below 100*l.*? and he contended, that the interest was not a thing issuing out of any part of the estate in the nature of a rent or service: that both principal and interest were a debt: that the interest must be considered as a debt on the personalty, just as the principal is considered as a debt: and that the estate was neither made of greater or less value by the mortgage, but was merely a pledge for the payment of the debt: that the legislature therefore, when they used the words "clear yearly value," meant to advert only to the value of the estate itself, and not to the quantity of interest, than any person might have in it; the thing itself without any regard to the charge upon it; provided only that the party was in possession: that in the same manner, in the case of a mortgagee in possession, there can be no doubt, but that he is entitled to kill game: and the Court in such case will not inquire into the amount of his interest money, of the sum advanced to the mortgager upon his land; provided the security,

(*a*) 7 G. 2. c. 20. s. 1.

the land itself, be of the annual value which the law requires: that the Court, before they pronounced, would well weigh the consequences of such a doctrine, as is contended for: that the justices, who must inquire into this in a summary way, must make all persons of whatever ostensible estate, disclose their private circumstances; which would be too great an extension of a law, already considered in many instances as tyrannical: that a rent charge indeed or services, issuing out of an estate, as matters of notoriety, might perhaps be considered by the justices; but of such things only as were ostensible, could they take cognizance: that, if every private family transaction in money concerns were to be laid open, if it could be seriously argued, that such discussions were proper subjects for a summary jurisdiction, it would be investing justices and informers with powers of harassing the country, as far beyond any known precedent as it was beyond the intention of the legislature: that their object had not any time been an inquiry into debts, but the actual possession of, and interest in, landed property, and the visible amount and extent of that property. That, as there was no authority directly upon this subject, it was proper to consider the question by analogy to the statutes in pari materia: that most statutes in these cases require a qualification altogether in land; but that two statutes in the reign of King James entitle the party under personal as well as real qualifications: that the Statutes 2 Jac. (*a*) enacts, that no one, "except such person or persons, which shall be seised, &c. of lands, tenements or hereditaments of the clear yearly value of ten pounds by the year or more, over and above all charges and reprises; or be possessed of goods or chattels to the full value of two hundred pounds to his own use, shall be qualified, &c.:" that it appears from hence, that the mere having in one's own right, and commanding the use of personal property, is sufficient to

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(*a*) C. 27. s. 3.

A. D. 1782. give a qualification, whatever may be the amount of such a proprietor's debts; consequently that when the same statute requires the having of a real estate of a clear yearly value, it must mean an estate, which would let for a clear sum, without any deduction to be allowed to the occupier, and exclusive of charges and reprises issuing out of the land; and that, if debts were not to affect the full value, mortgages, which were no more than debts, ought not to reduce the clear value; and that, such not being charges strictly issuable out of the lands, no inquiry was meant to be given into them: that in like manner the Stat. 3 Jac. (*a*) qualifies persons "having any manors, lands, tenements or hereditaments of the clear yearly value of 40*l.* or worth in goods and chattels 200*l.*:" that the Stat. 13 R. c. 13. which was the earliest upon this subject, and which must have been referred to by the framers of the above acts, qualifies laymen, having lands or tenements to the value, &c. and clergymen, advanced to the value, &c.; and that, as the title of this act was "none shall hunt, but they which have a sufficient estate," a collateral charge could not affect the privilege; and, if there was nothing strictly issuing out of the land, the having here must be sufficient. That in other cases, where the legislature have used the same language, mortages have not by construction been considered as incumbrances that reduced the value of the estate: that by Stat. 8 H. 6. c. 7. knights of shires are to be chosen by "people, &c." whereof every one of them shall have free land or tenement to the value, &c. above all charges: that not only mortgages were never construed to affect this right, but even so late as the 7th and 8th of W. 3. the legislature (*b*) declared, that, "the mortgager or cestuy que trust in possession shall and may vote for such estates, notwithstanding such mortgage or trust."—*Buller, J.* But he must swear, that he has

(*a*) C. 13. s. 5. This section respects shooting deer and conies only.

(*b*) C. 25. s. 7.

orty shillings a year, above every charge payable in respect of them.—*Chambre.* But this is by the express provision of (*a*) subsequent statutes.—Lord *Mansfield.* The privilege here is given to property; and the cestuy que trust, the mortgager, is really the owner: the trustee, the mortgagee, is merely nominal. We consider the defendant's interest in this Court just as it would be considered in a Court of equity. It is an interest subject to the payment of the mortgage: it is a qualification of property; and, though it is not necessary that he should have a legal estate, he must have such property in the land as shall produce a clear income of 100*l.* per annum; or it might be carried so far, as that he might have nothing, and yet enjoy the privilege. What then are a mortgager and mortgagee in chancery? One the owner, and the other, as having a charge upon the land; and the charge goes along with it.—*Buller,* J. In the case of rent-charges the cognizance of the justice is admitted; and in many others they must interfere, as in contracts between landlord and tenant. Neither is there any pretence on the part of the defendant to complain of hardship. Possession is prima facie evidence of property. The defendant must therefore be presumed to be the entire owner. The hard task lies upon the other party; who must make proof of the contrary. If the justice may receive proof of rent-charges and services, what should prevent his doing the like as to mortgages? The only point then is, whether the words "clear yearly value" mean "clear yearly value to the person in possession?" The words of this act would by themselves leave little room for doubt; but, when explained and supported by the Statutes of K. James in pari materia, the words of which are, "over and above all charges and reprizes," it can no longer admit of question, but that it must mean clear value to the person in possession: for, by the common rule of

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(*a*) 18 G. 2. c. 18. s. 1. and 19 G. 2. c. 28. s. 1.

A. D. 1782. construction, all statutes upon the same subject are considered as making one system of law; and consequently the words in the two last statutes must be referred to the statute in question. *Willes* and *Ashhurst*, Justices, concurring. Judgment for the plaintiff.

A. D. 1783. *The King v. Davis. Leach C. L. Cases, p.* 306.

Where a statute makes an offence felony, punishable with death without clergy, and a subsequent statute inflicts a milder punishment on the same offence, the latter statute is a virtual repeal of so much of the former statute as relates to the offence. Vid. Leach, C. C. 388—392. 2 East's Pl. Cr. 609. observations on this case.

At Hertford summer assize, 1783, John Davis was indicted on the Black Act, before Mr. Justice *Gould*, for "that he one fallow deer, of the price of forty shillings, of and belonging to Philadelphia Lee, widow, then and there being kept and fed in a certain park, of and belonging to the said Philadelphia Lee, enclosed with pales, where deer had been and then were usually kept, unlawfully, wilfully, and feloniously did hunt," &c. There were two other counts; one for killing, and the other for stealing the fallow deer as aforesaid. The Statute of 9 Geo. I. c. 22. upon which the indictment was founded, enacts, "that if any person or persons, being armed with swords, fire-arms, or other offensive weapons, and having his or their faces blacked, or being otherwise disguised, shall appear in any forest, chase, park, paddock, or grounds enclosed with any wall, pale, or other fence, wherein any deer have been or shall be usually kept, or in any warren or place where hares or conies have been or shall be usually kept; or shall unlawfully and wilfully hunt, wound, kill, destroy, or steal any red or fallow deer, or unlawfully rob any warren or place where conies or hares are usually kept; or if any person or persons shall unlawfully and wilfully hunt, wound, kill, destroy, or steal any red or fallow deer, fed or kept in any places, in any of his Majesty's forests or chases, which are or shall be enclosed with pails, rails, or other fences, or in any park, paddock or ground enclosed, where deer

have been or shall be usually kept; or shall forcibly rescue any person, being lawfully in custody of any officer or other person for any of the offences before-mentioned; or if any person or persons shall by gift or promise of money, or other reward, procure any of his majesty's subjects to join him or them in any such unlawful act; every person so offending, being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as in cases of felony without benefit of clergy." But the learned judge recollecting that an act of parliament had recently passed which reduced the offence charged in the indictment to a misdemeanor, he thought it improper to proceed to try the prisoner on the present charge for felony, until he had submitted to the judges the following question: Whether the Statute 9 Geo. 1. c. 22. so far as it respects the offences charged in the indictment, unaccompanied by the circumstance of being armed and disguised, is not virtually repealed by the Statute of 16 Geo. 3. c. 30. The Statute of 16 Geo. 3. 30. recites, that the statutes in force for the discovery and punishment of deer-stealers are numerous, and many of them ineffectual; and that the good purposes thereby intended might be better effected, if such of the said statutes as are found defective were repealed, and the good provisions therein contained, together with such other provisions as may be expedient, were reduced into one act: and then it enacts, "that if any person or persons shall course or hunt, or shall take in any slip, noose, toil or snare, or shall kill, wound or destroy, or shall shoot at, or otherwise attempt to kill, wound or destroy, or shall carry away any red or fallow deer, in any forest, chase, purlieu or ancient walk, whether enclosed or not, or in any enclosed park, paddock, wood or other enclosed ground, where deer are, have been or shall be usually kept, without the consent of the owner, or without being otherwise duly A. D. 1783.

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authorised; or shall be aiding, abetting, or assisting therein or thereunto; every person so offending by coursing, hunting, shooting at or otherwise attempting to kill, wound or destroy, or by aiding therein or thereunto, shall forfeit for every such offence the sum of twenty pounds. And every person so offending by killing, wounding or destroying, or by taking in any slip, noose, toil or snare, or by carrying away, or by aiding therein respectively, shall for every deer so wounded, killed, destroyed, taken or carried away, forfeit and pay the sum of thirty pounds. And if the offender in any of the cases aforesaid shall be a keeper of, or person in any manner intrusted with the custody or care of deer, in the forest, chase, purlieu, ancient walk or enclosed park, paddock or wood, or other enclosed place where the offence shall be committed, every such offender shall forfeit and pay double the penalty hereinbefore appointed to be paid by other offenders. And if any person or persons, after having been convicted of any of the aforesaid offences, shall offend a second time against this act, by committing any of the aforesaid offences; such second offence, whether it be the same as the first offence, or be any other of the aforesaid offences, shall be deemed and adjudged to be felony; and the person guilty thereof, being lawfully convicted upon indictment, shall be transported for the space of seven years." The act then goes on to shew the manner in which justices of the peace may proceed on conviction of offenders, and concludes with repealing such parts of the several statutes named in the margin (*a*) as relate to deer; but it is totally silent as to the intervening Statute of 9 Geo. 1. c. 22. upon which the present indictment was founded. On the first day of Michaelmas term, 1783, the twelve judges held a conference upon this subject at Lord Mansfield's chambers in Serjeant's Inn; and they

(*a*) 13 Rich. 2. c. 13. 19 Hen. 7 c. 17. 5 Eliz c 21. 3 Jac. 1. c. 13. 7 Jac. 1. c. 11. 13 Car 2. c. 3. and 4 Will. & Ma-

were unanimously of opinion, That the Statute of 16 Geo. 3. c. 30. amounted to a repeal of the felony of simply killing deer in a park enclosed; as it punishes the first offence with a pecuniary forfeiture of twenty pounds, and makes the second offence felony (*a*). A. D. 1783. ry, c. 23 5 Geo. 1. c 23. 10 Geo. 2. c. 32.

(*a*) The Statute of 5 Geo. 1. c. 27. inflicts a fine not exceeding 100*l.* and three months imprisonment on such persons as shall be convicted of seducing artificers.—The 23 Geo. 2. c. 13. inflicts a penalty of 500*l.* and twelve months imprisonment on the same offence; and Lord Mansfield held, that the latter statute was in this respect a virtual repeal of the former. Rex v. Cator, 4 Burr. 2026.—But see the case of Rex v. Brady at the Old Bailey, September session, 1797, where it is said by Mr. Justice Heath, that the prior statute was in these cases held to be repealed, because the latter statute was passed at a subsequent session; and that when both statutes pass at the same session, the latter is only explanatory of the former.—See also the case of Rex v. Michael Robinson, February session, 1796. Leach. Cr. Laws. p. 888.

Jones v. Smart. 1 *Term Rep. p.* 44. A. D. 1785.

Action of debt on the Stat. 5 Ann. c. 14. made perpetual by the 9 Ann. c. 25. to recover a penalty for killing game without being duly qualified; tried before Lord Mansfield at the last assizes in Surrey. Plea, the general issue. Evidence under it, a diploma from the university of St. Andrew's in Scotland, appointing the defendant doctor of physic; which it was contended gave him a sufficient qualification under the 22 and 23 Car. II. c. 25. This point now came on before the Court in the shape of a special case; and the only question for the opinion of the Court was, whether the diploma was a legal qualification.—*Conste*, for the plaintiff, contended that the defendant was not qualified. 1st. Supposing him to have the same rank as a doctor of the English universities, yet he is not such a character as was meant to be qualified by the Statute of Charles the Second. By the 1 Jac. 1. c. 27. the exception extends only to persons qualified in respect of property, or the son of a knight or lord, or the son and heir apparent of an esquire. The 3 Jac. 1. c. 13. is confined to property alone. The 7 Jac. 1. c. 11. still confines the right of killing game to property; only increasing the qualifi-

A diploma, conferring the degree of doctor of physic, granted by either of the universities in Scotland, does not give a qualification to kill game, under 22 and 23 Car. 2. c. 25. An esquire, or other person of higher degree, as such, is not qualified under that act; though the son of an esquire, or the son of other person of higher degree, is.

A. D. 1785. cation. The principal statute is the 22 and 23 Car. II. c. 25. which enacts, that "every person not having lands and tenements, or some other estate of inheritance in his own or his wife's right, of the clear yearly value of 100*l.* per annum, or for term of life, or having lease or leases of 99 years, or for any longer term, of the clear yearly value of 150*l.* (other than the son and heir apparent of an esquire, or other persons of higher degree, and the owners and keepers of forests, parks, chases, or warrens, &c.) is hereby declared to be a person by the laws of this realm not allowed to have or keep for himself or any other person, any guns, &c. for the taking and killing of game." The qualifications claimed by the defendant in this case, must be derived from construing the words of the statute, "or other person of higher degree," in the nominative case, and supposing that every person of higher degree than an esquire is thereby qualified. That this is not the true construction of the statute, is clear by the Case of the King v. Utley, 24 Geo. 3. in this Court. That was an information on the Game Laws; and a conviction of the defendant on the Statute of Car. II. as "not being the eldest son of an esquire, or of other person of higher degree."—*Chambre* moved to quash this information on the insertion of the word "of;" and contended that though this was copied from the precedent in Burn, it was not warranted in law, for that by this construction, neither an esquire nor a knight would be qualified as such. Mr. J. *Buller* there said, that the legislature seemed to him to have taken it for granted, that an esquire or other person of higher degree would have a sufficient estate to qualify him, and therefore they had neglected to do it expressly; though there was a case in Lord Hardwicke's time, where the word "of" was rejected, and no notice taken. However, he was of opinion that the conviction should be affirmed: and it

was so. He then quoted Camd. Brit. vol. 1. fo. 130. and Selden, cap. 1. to shew that esquires were originally persons qualified by estate. 2dly. Supposing that doctors of the two English universities have the right contended for by the present defendant (which in itself is a very doubtful matter), yet this diploma does not confer such a right. There is no instance in which foreign diplomas and degrees have been acknowledged here; there is a great difference between degrees acquired by long labour and residence, and one bestowed in a summary manner. 8 Rep. 114. Doctor Bonham's case. By the union with Scotland, it does not follow that persons who have taken Scotch degrees are to be endued with all the privileges which are bestowed by degrees taken at the English universities; the universities themselves do not admit of such degrees. Doctor Gilbert, some years ago, having taken his degree of doctor of divinity in Scotland, wished to preach in the university of Oxford, in his proper habit, as doctor, but was not allowed by the university. And Doctor Pitcairn accepted a degree at one of our universities, although he had before taken the same degree in Scotland.—*Erskine*, for the defendant, made three questions.—1st. Whether, on the construction of the Statute 22 and 23 Car. II. every person as a member of the civil state, who is an esquire, or superior in rank to an esquire, may not kill game? 2dly. Whether a doctor of physic who has taken his degree at either of the English universities be not such person? 3dly. Whether a Scotch diploma does not confer the same privileges? As to the first: the language of the statute is very strong; the word "other" must be considered as the nominative, and not as the genitive case, both in reason, and according to grammatical construction. It is clear the statute did not mean to confine the qualification altogether to landed property, by extend- A. D. 1785.

A. D 1785. ing it to the son and heir apparent of an esquire, who is supposed to have no landed property of his own. The esquires also who are enumerated by Camden are persons who have no land. From 8 Rep. 118. we may collect that when a statute will bear two interpretations, one contrary to sense, the other agreeable to it, the latter shall prevail. Here it was evidently the intention of the legislature, that persons of higher degree than an esquire should have a qualification; for if the opposite construction were to prevail, a person would have a derivative title, when the person from whom such title was derived would have none at all: and this very defendant's son will derive a right from his father's diploma, which it is contended the father himself cannot. 2dly. As to the question whether a doctor of either of the English universities be a person of superior degree to an esquire. All ranks and precedencies are settled in three ways; either by act of parliament, or by the king's patent, or by immemorial custom. Burn (*a*) taken from Blackstone (*b*) ranks doctors above esquires. So do the heralds: this is the very best authority which can be had from the nature of the case. But this relates only to English degrees. Then, 3dly. Does a diploma from Scotland confer the same right? A Scotch doctor is of equal rank with an English one as a member of the civil state. The 4th article of the Act of Union says, there shall be a communication of all rights, &c. except where it is expressly agreed on to the contrary. As to the college of physicians and the two universities refusing to allow to Scotch doctors their own privileges within their respective jurisdictions, they, as private corporations, have a right to make what regulations they please concerning their own bodies; but as to all general immunities derived from the common law, or under the Act of Union, they cannot deprive any body of these. The Court took

(*a*) 2 Burn. 260.
(*b*) 1 Black. Com. 405.

time to consider of their opinion: but Lord *Mansfield* A. D. 1785.
then said, that as to this latter ground, he had no doubt, that all privileges, granted by the statutes to the universities, were confined to our own, and did not extend to Scotland, or other foreign universities, which were governed by their own particular laws and customs. But that the general question upon the construction of the Statute of Car. II. should not pass undecided. Afterwards the Court delivered their opinion seriatim. Lord *Mansfield*, Ch. J. This is an action of debt brought by the plaintiff againt the defendant, for using a gun for the purpose of killing game, not being duly qualified under the statute. The special case states, that the defendant rested his justification upon a diploma which was produced, whereby the university of St. Andrews in Scotland had conferred on him the degree of a doctor of physic. Two objections have been raised by the counsel for the defendant against the competency of this action. First, that under this diploma, the defendant hath the same rights and privileges conferred upon him, as are acquired by a degree bestowed by either of our own universities. 2dly, That doctors in all the learned professions are of higher degree than an esquire, and therefore by the 22 and 23 Car. II. they are exempted from the penalties of the several statutes relating to game. The Statute 22 and 23 Car. II. has these words, "other than the son and heir apparent of an esquire, or other person of higher degree." For the defendant it has been contended that "other person of higher degree" relates to the esquire himself, and means that a person of higher degree than an esquire is qualified; whereas on the other side it is contended, that it means "other than the son and heir apparent of an esquire, or the son of any other person of higher degree." To be sure, absurd consequences may seem to follow from giving a privilege to

A. D. 1785. the son, which the father has not: but the question is, has the statute done it or not? I wished to have the general point determined, because of the consequences. This Court considered the point once before in the Case of the King and Utley, and there they held, that the statute meant, "the sons of other persons of higher degree." On full consideration I am not ripe to vary from the opinion given in that judgment. All the precedents are so; Burn's precedent gives the same construction. But what struck me most was this, the drawer of this Statute of Car. II. certainly had the former Statute of Jac. I. in his view; for though it does not follow the other statute throughout, yet it does in that clause, and that does not admit of a doubt; for there the word "of" is expressly inserted. I cannot therefore unnecessarily vary from the decision that has been given; I say, unnecessarily, because I am satisfied on the other ground of the opinion which I delivered the other day. On that ground there is not a colour for saying that the defendant is qualified by the Act of Union. It is true, that by the fourth article of that act, the Scotch have the same general privileges as the English, but then they must have the same qualifications, otherwise they come not within the same description; for the general article, which declares there shall be a communication of all privileges, can only mean such as are of a general nature. A burgess of London is endued with certain privileges, to which a burgess of Edinburgh has no claim: so in every case where a privilege is of a qualified nature, it must be understood with that qualification. A doctor of the English universities may become a member of the college of physicians; may plead in Doctors Commons; and has various other privileges, from all of which a Scotch doctor, as such, is excluded. The qualifications therefore must be from Oxford or Cambridge.

In like manner, the statute allowing men of certain degrees to have dispensations for holding two livings necessarily refers to such degrees only as are obtained in an English university; for the church of Scotland is distinct from ours, and admits not of the same rules. Therefore, whatever rank the defendant may hold by courtesy, he is not in point of law to be considered as a doctor to this purpose.—*Willes*, J. It is my misfortune to differ from the rest of the Court on the construction of the Statute of Car. II. The Case of the King v. Utley came before us on a motion to quash a conviction on the 22 and 23 Car. II. c. 25. on account of the word "of," being inserted before the words "other persons of higher degree." I find, by looking into my own paper-book, that the case was but slightly argued; and the Court principally relied upon the ground of all the precedents having been in that form. I adopted that opinion at the time, but I now beg leave to retract my assent to that determination, for three reasons: 1st. The Game Laws are already sufficiently oppressive, and therefore ought not to be extended by implication. 2dly. Because I think that, in grammatical construction and propriety, the words "other persons" must be taken to be in the nominative and not in the genitive case. 3dly. Because a different construction is unnatural and unreasonable, and must be productive of endless inconvenience and absurdity. First. Nothing can be more oppressive than the present system of the Game Laws. We are told that they arose from the old forest laws, which restricted the right of killing game to much narrower limits; and hence that these new regulations encroach on no privileges to which we were before entitled, are introductive of no new or extraordinary severities, but on the contrary are mild and supportable when compared with the sources from whence they flow. Mr. Justice Black- A. D. 1785.

A. D. 1785. stone, however, in the 2d book of his Commentaries, c. 27. holds a different language. And wherever a law is productive of tyranny, I shall ever give my consent to narrow the construction. 2dly. According to the grammatical construction of that clause in the statute, in my opinion, the words "other persons of higher degree" must be taken in the nominative case, for want of the word "of;" and I am the more confirmed in this opinion; for where the legislature meant the genitive case, they have expressly inserted the word "of," as in the Statute 1 Jac. I. c. 27. which is one of the statutes for the preservation of game, and the 9 Ann. c. 5. § 2. which relates to qualifications for sitting in parliament. But, 3dly. What I most rely on, are the many unaccountable absurdities which must flow from a different interpretation. The eldest son of a barrister at law, or of a captain in the army or navy, will be qualified as such, and yet the father himself will not. Even a peer, who is not qualified by property, will not be privileged to hunt or kill game; though his son, who claims through him, will have that privilege. The act could never mean to annex the qualification to land only: the term esquire has no relation whatever to landed property; for no landed estate, however large, will confer the title; but it must be acquired either by office, the king's patent, or some of the means laid down by Selden and Camden. A lord of a manor is certainly not an esquire by virtue of his manor or royalty, though in common acceptation he is considered as such. This is evident from the 2d section of the 22d and 23d Car. II. c. 25. which empowers lords of manors or other royalties, not under the degree of an esquire, to appoint game-keepers; but no lord of a manor under that rank can make such an appointment, whatever his estate may be. On the other hand, was ever an esquire, since the passing of this act, convicted

on it? If no instance of any such conviction can be produced, that shews the general sense of the nation as to this act, and is a much more powerful argument, and has greater weight with me, than any faulty precedent in Burn. If we look into the preambles of the statutes upon the same subject, is it not plain against whom they are pointed? Chiefly against persons of low degree, to prevent mechanics from leaving their lawful trades and employments to kill and destroy the game, to the prejudice of noblemen, gentlemen, lords of manors, and others. For these reasons I think gentlemen of this description ought not to be deprived of their amusement, and this is my opinion on the general import of the act; how far it may affect the present question, is another matter. As to the second point. If an esquire, as such, is qualified, I am likewise of opinion that doctors are so. To this it is objected, that, at all events, a person, who has not taken his degree at either of our own universities, is not to be considered in the light of a person qualified by the same means that those are. But this objection is in my mind done away by the 4th article of the Union, which enacts, that there shall be a communication of all privileges, except where it is expressly provided to the contrary. As to their being excluded by the college of physicians, that is merely the result of a local institution. However, as the rest of the Court are against me on the first point, I shall give no further opinion upon this.—*Ashhurst*, J. I see no reason for departing from the construction which has been put upon the Statute 22 and 23 Car. II. by this Court in the Case of the King and Utley. The Game Laws are rather to be considered as positive rules that as founded on reason; therefore it is safer to adopt what they have actually said, than to suppose what they meant to say. Though by the Statute of Jac. I. rank as well as property gave a qualification; yet un- A. D. 1785.

A. D. 1785. der this Statute of Car. II. a man can only be qualified by means of property. But, said the legislature, the heir apparent, who is in the line of succession, shall likewise be qualified, from a supposition that the esquire was so already. According to which construction I cannot think that it was their intention purposely to exclude the father, but in fact they have done it; and the matter is put out of all doubt by the Statute of James, which expressly excludes them; and so does the Statute of Car. II. as effectually in my opinion. The blunder has been adopted perhaps without meaning it. This appears to me from the wording of the clause; for it should seem strange, that in fixing the qualifications, they should begin with property, then go to a derivative qualification, and then return to a very large description of original ones, namely, quality and degree. In a grammatical sense also, it must be taken to be in the genitive case, in the same manner as if the word "of" had been actually inserted. I see no reason to depart from the construction put upon the Statute Car. II. in the King and Utley, as founded on the precedent in Burn; nor can any inconvenience result from it; for the legislature may hereafter extend the qualification, if they think proper. It is not necessary to say any thing upon the other head; if it were, I should agree with my Lord.—*Buller*, J. The Case of the King and Utley did not pass with so little argument as my brother Willes supposes: for I remember it was argued very fully; and the grounds of our decision were, 1st. The constant form of convictions on the Game Laws, which ought to have great weight with the Court. 2dly. From a comparison of the several acts relating to game. But notwithstanding that decision, if at this moment I saw any reason to alter the opinion which I then gave, I would readily do it, and correct my mistake. But upon the best consideration, which I have

been able to give the subject, in my opinion that judg- A. D. 1785.
ment was right. 1st. Taking this clause of the Act of Car. II. in a grammatical sense, had the exception extended no farther than to "other persons of higher degree," still I should have thought that the word "of" was intended, and that the word "other" was to be understood in the genitive case; but I am confirmed in my opinion by the manner in which the clause proceeds; for the words immediately following are, "and the owners and keepers of forests, parks, chases, and warrens:" now, had the preceding part of the sentence, "or other persons of higher degree," been intended to be taken in the nominative case, why did the legislature alter the mode of expression? For when they speak of other persons to be exempted in their own right, they then change the words. Again, it is asked, What reason is there for excepting the elder son alone, and not the younger? The only reason that can be given is, because the eldest son is presumptive heir to the real estate, which is a further argument for supposing that landed qualification was the immediate object of the statute; and in fact this Act of Car. II. had that principally in view; for it repeals the personal qualification of the Statute of James, and leaves no other qualification but that of land, with the exception in favour of the heir apparent, on account of his right of succession. And we may observe, that there is the same exception introduced into the act for qualifications of members of parliament. I have no doubt that the legislature took it for granted, that esquires themselves would be qualified in respect of their land; and, for the reason assigned, extended the qualification to their eldest sons. So that had the legislature been asked at the time of making this act, Whether they intended to exclude the younger sons of dukes? they would have answered, No. But I am as firmly per-

A. D. 1785. suaded that had the same question been put to them respecting doctors, they would have answered in the affirmative. Be that as it may, we are bound to take the act of parliament as they have made it: a casus omissus can in no case be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider, whether such a law that is passed is tyrannical or not. It has been said that this act is only pointed against persons of low degree, as appears from the preamble. To consider the preamble of an act is to be sure in general a good mode to come at the meaning of the legislature, but it does not assist us in this case; for we gather from the enacting part of the statute that a person who has a freehold of 99*l.* per annum, or a leasehold for 99 years of 149*l.* per annum, is not qualified; but can it be said that either of these is a mean or vulgar person? Thus far we have been considering the Statute of Car. II. alone; but now consider it as coupled with the former statutes which are in pari materia. In the Statute of James, the same words "other persons of higher degree" are used, and there it is clear that they are used as part of the description of the sons for the particle "of" is expressly prefixed: now if the Statute of Car. II. is any ways doubtful, we must expound it by the Statute of James, and that is confined to sons alone. But the strong ground of all is, that all the acts relative to game have been from time to time restrictive of the right to kill game. They abolish some qualifications, and raise the others, and consequently lessen the number of qualified persons; and no one statute can be construed into an enabling one. This is decisive. There is not a pretence to say that a doctor of physic is within the exception of the Statute of James; then if he is not within that statute, how can he be said to be qualified under the Statute of Car. II. which is a restraining one,

and gives no new qualification whatever? As to the other question, whether a doctor of physic of the defendant's description is qualified, I think he is not, on another ground: but on this head I refer generally to what my Lord has said. Judgment for the plaintiff. A. D. 1785.

The King v. Crowther. 1 *Term Rep. p.* 125. A. D. 1786.

Conviction on 5 Ann c. 14. quashed, because the witness was not sworn and examined in the presence of the defendant. It is not sufficient to read over the deposition in the defendant's presence. The evidence need not negative every specific qualification under the 22d & 23d Car. 2. c. 25.

This was a conviction before a justice of the peace on the Statute of 5 Ann. c. 14. for using a gun. After stating the information, which negatived specifically ev ry one of the qualifications in the 22 and 23 Car. 2. c. 25. it proceeded to state, that, "on the same 14th day of the same month of September 1785, at the parish of Sevenoak, in the county of Kent, one credible witness, to wit, Edward Tye, came before me the said justice, and by his deposition taken in writing before me the same justice upon his oath on the Holy Gospel to him then and there by me the aforesaid justice administered, swore, and upon his oath aforesaid affirmed, and said, that the aforesaid Thomas Spencer Crowther on the 8th day of September aforesaid, in the year aforesaid, at the parish, &c. did keep and use a gun and certain dogs called setting-dogs or pointers, to kill and destroy the game, and hunted them over certain grounds, part of Black Hall farm, in the parish aforesaid, &c. and did then and there shoot at and kill one partridge with his said gun, against the form of the statute in such case made and provided. And afterwards, that is to say, on the 15th day of September, in the year aforesaid, he the said Thomas Spencer Crowther, having been duly summoned in this behalf, appeareth before me the justice aforesaid, and is present in order to make his defence against the said charge; and having heard the same, and the aforesaid deposition of the said Edward Tye having been read over again unto the said Edward Tye in the presence and hearing of the said

A. D. 1786. Thomas Spencer Crowther, and the said Edward Tye having again affirmed his said deposition to be true in the presence and hearing of the said Thomas Spencer Crowther, he the said Thomas Spencer Crowther is asked by me, the said justice, if he can say any thing for himself, why he the said Thomas Spencer Crowther should not be convicted of the premises above charged upon him in the form aforesaid: whereupon the said Thomas Spencer Crowther saith, that he is not guilty of the said offence; but he doth not produce to me any evidence whatsoever, that he is in any manner qualified, allowed, or authorised, by the laws of this realm, to have, use, or keep, for himself, or any other person or persons, any gun, setting-dog, pointer, or any other engine to kill and destroy the game of this kingdom. And thereupon it manifestly appearing to me that the aforesaid Thomas Spencer Crowther is guilty of the said offence charged upon him in the said information, I do therefore hereby convict him of the offence aforesaid, and do declare and adjudge that he the said Thomas Spencer Crowther hath forfeited the sum of 5*l.* for the offence aforesaid, &c.—*Bond* now moved to quash this conviction, on the two following grounds; 1st. That the evidence on which the conviction was founded was not given in the presence of the defendant; for on the defendant's appearing before the justice, the witness only affirmed his deposition to be true. It was a principle in our law that the evidence must be given in the presence of the defendant, that he might have an opportunity of cross-examining the witness. The King v. Vipont and others. 2 Burr. 1163. 2dly. The qualifications required by the Statute 22 and 23 Car. 2. c. 25. were not negatived by the evidence. The evidence was only general, that what he did was "against the form of the statute in such case made and provided." It ought to have been as special as the informa-

tion itself.—Mr. Justice *Denison* says, "the evidence and adjudication ought both of them to be, that he has not these qualifications, which are specified in that act, nor any of them." Rex v. Jarvis (*a*). And by *Ashhurst*, Justice, in the Case of the King v. Wheatman (*b*) "the evidence must prove, but cannot supply any defects in, the information." He also cited Andrews, 240. and Bluet qui tam v. Needs, Comyns, 525.—*Mingay*, contra, contended, that this differed from the Case of the King v. Vipont, for the deposition of the witness having been read over in the defendant's presence, was affirmed by the witness to be true, and was the same as if he had been re-sworn. As to the second objection; it was only stated in the information against Jarvis that he was not qualified generally; and the Court said, that the information ought to have negatived every separate qualification. It had done so in the present case, and was so stated in the conviction; and there was no occasion to prove it by evidence. It was impossible to bring evidence to prove the want of each qualification negatively. If the information is specific, a general deposition, that he is not qualified, is sufficient to put the defendant upon proving that he was.—Per Curiam. The first objection is good; the witness ought to have been re-sworn in the defendant's presence. As to the other point, there is no case in which it has been directly decided that the evidence should negative every particular qualification. It cannot be so from the nature of the case. Conviction quashed.

A. D. 1786.

(*a*) 1 Burr. 154.

(*b*) Dougl. 332.

Smith v. Wallis. 1 *Term Rep. p.* 252.

A verdict had been given for the defendant in an action on the late Game Act, for shooting without a certificate. And the Master had taxed treble costs under that (*a*) clause in the act for protecting persons sued for any thing done in pursuance of the act.—*Bower* now

Under the 25 G. 3. c. 50. only those defendants who are acquitted upon a prosecution for

(*a*) Sect. 28.

A. D. 1736.

Persons are entitled to treble costs.

moved that the Master might review his taxation, on the ground that the statute only intended to give treble costs to those persons who were prosecuted for seizing guns.—*Abbot* opposed this motion in the first instance, and contended that the act also meant to give treble costs to persons sued for penalties under the act. But the Court were of a different opinion, and made the rule absolute.

The King against the Inhabitants of Old Alresford.
1 *Term Rep. p.* 358.

Where the pauper rented "the fishery of a pond, with the spear-sedge, flags, and rushes growing in and about the same, for 10*l.* a year," the Court understood that the soil passed with it, and that it was a tenement within the statute 9 & 10 W. 3. c. 11. The fact of the pauper's taking a tenement of 10*l.* a year is sufficient to give a settlement, though the lessor has no title.

Two justices by an order removed John Dorey, his wife and children, from the parish of Old Alresford to the parish of Chilton Candover, both in the county of Southampton. The Sessions, on appeal, quashed that order, and stated the following case: That the pauper's father, and also the pauper himself, resided in Old Alresford under a certificate from Chilton Candover, and that the pauper and his family before the order of the removal became chargeable to Old Arlesford parish. That after the pauper's father went into Old Alresford he rented a house and piece of land in Old Alresford at 3*l.* a year, and occupied the same several years. That during two years he took and held under a parol agreement from Mr. Edwards the following premises in Old Alresford, viz. the fishery of the pond, containing 60 acres, called Alresford Pond, with the grates, &c. and also all the spear-sedge, flags, and rushes, growing in and about the said pond, and the right of cutting the sedge growing on a piece of rough meadow or sedgy ground, containing seven acres, not being part of the said pond, but being distinct therefrom, and held under a different right. That the pauper's father agreed to pay Mr. Edwards 10*l.* a year for the said premises, and to supply Mr. Edwards's house with fish. That during the time the pauper's father held the said premises of

Mr Edwards he rented and held under a parol demise the fishery of the causeway river in New Alresford, with the grates to a small fish-house, and paid 3*l.* a year for the same. That the said house and piece of land first mentioned, and the right of cutting sedge, &c. on the said seven acres of rough meadow ground, and the said fishery, &c. last mentioned, were together of the annual value of 10*l.* without taking the said pond or any thing thereto belonging into the account. That the counsel for Old Alresford, to shew that Mr. Edwards had no right to demise the fishery of the said pond, offered to prove, that in 1759, the then bishop of Winton, being seised in fee of the soil of the said pond, granted a patent of the office of supervisor and governor thereof to George Bridges Rodney, Esq. (now Lord Rodney) and his son George Rodney, &c. That at the time Mr. Edwards made the agreement with the pauper's father, he held of the said George Bridges Rodney and George Rodney the premises granted by the patent, and had no other interest in the said pond. That previous to such taking, viz. in 1764, the then Bishop of Winton, lord of the manor of Old Alresford, at a court baron held for that manor, granted to the said Lord Rodney all the rushes, reeds, and flags growing in Alresford pond for 21 years. That Mr. Edwards, at the time of the said agreement with the pauper's father, held of the said Sir George Rodney whatever was granted as last aforesaid; but the Court were of opinion such evidence was inadmissible, and refused to hear the same.—*Bearcroft* and *Portal* were to have argued in support of the order of sessions, but the Court desired to hear the other side.—*Wilson*, *Lawrence*, and *Burrough*, against the order, contended, that, this being the case of a certificate man, it was incumbent on the other side, according to the doctrine laid down in the Case of the King and Warblington (*a*) to shew that the certi- A. D. 1786.

(*a*) 1 Term R. 241.

A. D. 1786. ficate was discharged; in order to do which, they proved that the pauper took the fishery of Alresford Pond. But fishery being an equivocal phrase does not ex vi termini mean a several fishery. From the statement of the case it does not sufficiently appear what kind of fishery the pauper took; whether it was a several or free fishery, or only a common of piscary; therefore as the appellants proved generally that he took a fishery, it entitled the respondents to enter into evidence to explain what kind of a right the pauper had taken. If the Sessions had admitted the evidence which was offered, it would have appeared that the lessor of the pauper had not himself such a right as it is stated that the lessee had taken. This is not like the case of land which is necessarily a tenement within the statute, on which account the Court have always refused to enter into the title of the occupier, and where it is sufficient if he holds even under a disseisor; for here it would have appeared that the subject of the demise was not a tenement within the statute. But supposing that the Sessions did right in rejecting the evidence offered, yet this is a question upon the certificate act (*a*), and it has never hitherto been decided that an incorporeal hereditament is a tenement within that statute. In the Case of the King and Thames Ditton (*b*) Lord *Mansfield* said, that the poor law was a system of positive law, and that any person claiming a benefit under it must bring himself within the strict letter of it. And besides, if an incorporeal hereditament be a tenement within the statute, it can only pass by deed; and this is stated to be by parol.—Lord *Mansfield*, Chief Justice. Upon this state of the case the Court will consider that the fishery and the soil passed together; therefore the pauper took a tenement within the statute.—*Ashhurst*, Justice. There is no doubt but that a fishery is a tenement. Trespass will lie for an injury to it;

(*a*) 9 and 10 W. 3. c. 11.

(*b*) E. 25. G. 3.

and it may be recovered in ejectment.—*Buller*, Justice. A. D. 1786.
The Court go upon this ground, that the Sessions have no occasion to go into the title of the lessor at all. The fact of letting a fishery is sufficient, and we must presume that the soil passed along with it. Though I am by no means ready to allow that if it had been any other kind of fishery, it would not have given a settlement. The Sessions however ought only to admit evidence to controvert the fact of the pauper's taking the tenement. Order of sessions affirmed.

The King v. Thompson. 2 *Term Rep. p.* 18. A. D. 1787.

In a conviction on the 5 An. c. 14. s. 4. evidence, that the defendant kept and used a gun to kill and destroy the game, was held sufficient.

In a conviction, if the defendant appear and plead, and the evidence be given on the same day, the Court will intend, that the evidence was given in the defendant's presence. Where the conviction after stating the evidence, stated, "thereupon the defendant on, &c. at, &c. before me, &c.

This was a conviction on the 5 An. c. 14. s. 4. stating (according to the precedent in 2 Burn. 308.) the information against the defendant on the 8th December, 1786, the appearance of the defendant on the 9th, after being summoned, and the plea of not guilty; and then proceeding as follows; nevertheless, on the said 9th day of December, in the year aforesaid, at &c. one credible witness, to wit, Richard Taylor, of, &c. cometh before me the said justice, and before me the same justice, upon his oath on the Holy Gospel to him then and there by me the aforesaid justice administered, deposeth, sweareth, and upon his oath aforesaid affirmeth and saith, that the defendant on the 7th day of December aforesaid, in the year aforesaid, at &c. [negativing the qualifications of the 22 and 23 Car. 2. c. 25. s. 3.] did keep and use a gun to kill and destroy the game; and thereupon the said Thompson, (the defendant,) the said 9th day of December, in the year aforesaid, at, &c. before me the same justice, by the oath of one credible witness aforesaid, according to the form of the statute aforesaid, is convicted, and for his offence aforesaid hath forfeited the sum of five pounds, to be distributed as the statute aforesaid doth direct, &c. This was argued last Term by *Cockell*, Sergeant, against the con-

A. D. 1787.

by the oath of one credible witness, according to the form of th statute, is convicted," it was held to be an adjudication of the justice that he is convicted of the offence.

viction, and *Lambe* in support of it; when it was objected, that it did not appear upon the conviction of what the defendant had been convicted; it is only said, "thereupon the defendant on, &c. before me the same justice, by the oath of one credible witness, according to the form of the statute, is convicted, and for his offence aforesaid hath forfeited, &c." This is only a conclusion of law, and not an adjudication of the justice. There is nothing to connect it with that which precedes it; such as that "he is convicted of the premises," or "in manner and form aforesaid." And they cited the following cases, The King v. Jarvis, 1 Burr. 148. The Queen v. Matthews, 10 Mod 26. The King v. Pickles, cited in 1 Burr. 153. and the King v. Green, H. 24. G. 3. B. R. And it was observed that this conviction was taken from the precedent in Burn (*a*). The Court were clearly of opinion that there was no ground for that objection; but they desired it might be argued again on another objection, which they suggested to the counsel, whether the evidence was sufficiently set forth, so that the Court could see by what act the defendant had incurred the penalty; for they observed that the act of keeping a gun was in itself ambiguous, and that it must be shewn to be kept for the purpose of killing game, in order to bring the party keeping it within the act of parliament; it was not like keeping a greyhound or a snare which could not be kept for any other purpose, and which was expressly prohibited by the act.—*Wood* now argued against the conviction. It is a fatal objection that the evidence, on which the conviction is grounded, is not particularly set forth. The evidence which is stated is merely a repetition of the information. Only the result arising from the facts is set forth; but every part of the evidence ought to have been specially shewn, that this Court might have had an opportunity of judging whether the justice convicting

(a) 2 Burn. 328.

drew a legal and proper inference from the facts sworn to, A. D. 1787.
so as to bring the defendant within the penalty of the act of parliament. In the Case of the Queen v. Green (*a*), it was objected that the evidence, upon which the defendant was convicted, was not set forth. It was only said, that the witness was sworn de veritate præmissorum, without saying, "what the answer of the witness was." And though it was said, that it did appear, from what was sworn to the justice, that he was guilty, yet it was answered, that it ought to have appeared so to the Court from the nature of the evidence specially set forth. And the Court were of that opinion. In the Case of the King v. Killet (*b*), this doctrine is recognized, where it was objected, that the justice only stated "that the charge as set forth, being duly proved before him, &c." and the objection was held to be fatal, because he did not set forth the evidence particularly. It was there determined, "that upon a conviction, it is necessary, that the evidence should be set out, that the Court may judge whether the justices have done right." The same law is declared in the Case of the King v. Vipont (*c*). Now in the present case it does not appear for what purpose the gun was kept, or in what manner it was used. The act of keeping a gun is equivocal; it may be used for other purposes than that of killing game; and therefore the facts of keeping and using should have appeared by the evidence, in order that this Court might see whether it was kept and used for the purpose of destroying game. This is not like keeping a lurcher, the bare keeping of which is evidence of the purpose for which it is kept. In the King v. Filer (*d*), a difference was taken as to the keeping a dog, which could only be to destroy the game, and keeping a gun, which a man might do for the defence of his house. And though it is here said, that "the defendant used the gun, &c." it ought to have appeared by

(*a*) 10 Mod. 213.

(*b*) 4 Burr. 2063.

(*c*) 2 Burr. 1163.

(*d*) 1 Stra. 196.

A. D. 1787. the evidence how he used it. The evidence, which was given before the justice, could not have been given in the manner in which it is stated in the conviction; for this evidence is the language of the act of parliament: and even if it were given in this general way, the justice ought to have refused it. If this evidence were allowed to be sufficient, the Court will never on any future occasion be able to judge whether a defendant has been properly convicted, because the evidence will always be stated in the very words of the information.—*Chambre*, contra, did not dispute the general rule that it was necessary to state the evidence particularly in a conviction, but insisted that in the present case the evidence was sufficiently stated. The Case of the King v. Filer is not applicable to the present; for there it was only said that "keeping a gun" was not sufficient to bring the defendant within the act of parliament, unles he kept it for the purpose of destroying game, because he might keep it for the defence of his house; but here it is expressly stated that the defendant "kept and used the gun to kill and destroy the game," so that it is here positively sworn as a fact that the defendant used it for the purpose of killing game. In the Case of the King v. Hartley (*a*), where the defendant had been convicted of "keeping and using a dog, called a greyhound, for the destruction of game," this very objection was taken and overruled. Besides a very strong argument arises from considering that this form of conviction has been almost universally used on similar occasions; it follows the precedent in Burn's Justice. This was allowed to have considerable weight in the Case of Jones v. Smart (*b*); and if this conviction were to be quashed, every conviction which has been made for many years past, would be removed hither by certiorari, in order that they might be overturned on the same objection; and the several justices

(*a*) E. 22 G. 3. B. R.

(*b*) 1 Term Rep. 44.

who have proceeded upon them would be liable to actions by the respective offenders.—*Ashhurst*, Justice. If this were a new case, I should most undoubtedly be of opinion that this conviction could not be supported; because I think that the evidence should be set forth particularly, that we may judge whether the justice has convicted upon proper evidence. The fact of keeping or using the gun for the purpose of destroying game should appear: but it is only stated here that the defendant kept and used, &c. which is the result of his evidence. Then whether he kept it for the purpose of killing game is likewise a question of law: for an ignorant witness in the country might fancy that a woodcock or a rabbit was game. So that it seems to me that permitting this general evidence to be stated, is allowing the witness to give his sentiments on the law as well as on the facts. But at the same time, as the precedents are usually in this form, and as the conviction in the King v. Hartley was similar to the present, it is better to support this conviction, than by quashing it to overturn all former precedents.—*Buller*, Justice. If this precedent had never been adopted, I should have been of opinion that the evidence should have been fully set forth: but after so many convictions have been made in the same form, it would be dangerous to quash the present. The distinction taken in the King v. Filer is good law: it is not an offence to keep or use a gun, unless it be kept or used for the purpose of killing game. But it is here stated by the evidence "that the defendant did keep and use a gun to kill and destroy the game." As to the other question respecting game, I cannot agree that the witness in swearing that the defendant used a gun to destroy game would be swearing to a question of law, because it is settled by act of parliament, and every man is bound to know what is game: if he swears that to be game, which is not so in law, he would

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A.D. 1787. be guilty of perjury : game must be understood in it's legal sense.—*Grose*, Justice. I cannot give my consent to support this conviction. The justice should return particularly all the facts and the conclusion in the conviction ; first the information, the summons, the appearance or the defendant's default in not appearing, that the information was read to the defendant, that he was asked what he had to plead, the whole of the evidence particularly, and the adjudication The witness should swear to the facts, and not to the law. And in this case it is almost incredible that the witness should have sworn in the manner in which this evidence is set out. The justice should not have received it, if it were offered in this general way ; but should have questioned the witness as to the manner in which this gun was kept, for what purpose it was used, and what particular kind of game he killed or attempted to kill. All these particulars should have been specially set forth, in order that we might judge whether they constituted an offence within the act of parliament. Here the witness swore to the law, namely, " that the defendant kept and used a gun to kill and destroy the game." And in the Case of the King v. Baker (*a*), a conviction for taking pilchards was quashed, because the witness swore generally that the defendant was guilty of the premises, which was taking upon himself to swear to the law. Now the reasoning in that case applies strongly to the present, for the evidence here stated only amounts to that, that the defendant is guilty of the premises. I confess indeed that the Case of the King v. Hartley is of considerable authority the other way. But I would rather choose to decide this case according to that of the King v Baker, because I think nothing can be more mischievous to the country than suffering a justice of the peace to state the conviction generally. And there can be no inconvenience in stating particularly the

(*a*) 1 Stra. 316.

whole matter for the opinion of this Court, if the justice does not exceed his authority. Although the present conviction cannot be quashed, because my brothers have given their opinions in support of it, yet I did not choose that this question should pass sub silentio; especially as this declaration of my opinion may have the effect of inducing justices of the peace in future to state the whole matter upon the record.—The Court, however, entertaining some doubt on another part of the conviction, namely, whether it sufficiently appeared that the evidence was given in the defendant's presence, desired the matter might stand over. On the next day. —*Ashhurst*, Justice, said, On looking into the cases, we find that this objection has before been made; and the Court have held that in cases circumstanced like the present they will intend that, as the whole proceedings are stated to have passed on the same day, the evidence was given in the presence of the defendant. As to the principle drawn from the old cases, that the Court will be astute in discovering defects in convictions before summary jurisdictions, there seems to be no reason for it. Whether it was expedient that those jurisdictions should have been erected was a matter for the consideration of the legislature; but as long as they exist we ought to go all reasonable lengths to support their determinations. Therefore in whatever light they may have formerly been viewed, yet the country are now convinced that they derive considerable advantage from the exercise of the powers delegated to the justices of the peace; and in modern times they have received every support from the courts of law. Therefore I see no reason for altering the opinion which I gave yesterday.—*Buller*, Justice. It has been decided in several cases that there is no foundation for this objection. The first of them was the King v. Aiken (*a*), where the conviction, as far as the evidence went, was precisely

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(*a*) 3 Burr. 1735.

A. D. 1787. similar to the present, the Court said "It may be presumed that the witness was examined in the defendant's presence." The next Case was that of the King v. Kempson (*a*); there the same objection was made, but the whole transaction appearing to have passed before the magistrate on the same day, Aston, Justice, said, "Enough appears upon this conviction to shew that the witness was examined in the presence of the defendant. It must be supposed that all that passed was at one and the same time." Besides that the precedent in Burn is in the same form. With respect to the other question, that also has been decided by the Case of the King v. Hartley (*b*): there the first objection was, that the defendant had sworn to the law: for that what was game was a question of law; but that objection did not prevail. The second objection was, that the evidence was not sufficiently set forth, because the manner of keeping or using the greyhound did not appear, and the conviction only pursued the language of the act of parliament. Upon that occasion Lord *Mansfield* said, convictions must be precise, that the Court may see that they fall within the jurisdiction of the justices. There are two offences described by the act of parliament, keeping, or using, for the purpose of destroying game. There may be a keeping without its being for the purpose of destroying game; therefore there should be evidence of the purpose for which it is kept. But the evidence states, that the defendant used as well as kept the greyhound for the destruction of game. So that this case goes the whole length of deciding the other objection which was made yesterday (*c*). *Grose*, Justice. As the precedent in Burn (though it seems to me a faulty one) has been recognized by this Court in the Case of the King v. Hartley, of which I was not aware before yesterday, I think it must be supported. It might be highly inconvenient to over-

(*a*) Cowp. 241.

(*b*) H. 22. G. 3. B. R.

(*c*) Vid. 2 Str. 1098. 1 Wils. 315.

turn it; and I should be sorry that any opinion of mine should shake the authority of an established precedent; since it is better for the subject that even faulty precedents should not be shaken than that the law should be uncertain. Conviction affirmed. A. D. 1787.

The King v. Carlyon, Clerk, and another. 3 *Term Reports, p.* 385. A. D. 1789.

Fish are tithable by custom: and the proprietors of such tithes are liable to be rated to the relief of the poor.

Upon an appeal to the quarter-sessions of the county of Cornwall, against a rate for the relief of the poor, they confirmed the rate, subject to the opinion of the Court, on a case, stating that the appellants were the proprietors of the tithe sheaf of the parish of Paul, and also of one-tenth of all fish taken, or caught, and brought on shore within the parish; and that they and their tenants were rated as follows:

	£.	s.	d.
The Reverend Thomas Carlyon and Mrs. Veale, the rectorial tithe of pilchards -	0	19	10½
Edward Paddy, (who was a tenant to the appellants,) for the tithe of the hook fish, and all other fish, except pilchards and herrings, in the village of Newlyn, which lies in the parish of Paul - - - - - - - -	0	5	3½
Benjamin Harry, Richard Wright and Co. (who were also tenants of the appellants,) for the tithe of hook fish, and all other fish, except pilchards and herrings, in Mousehole, also within the said parish - - - -	0	2	4
John Glasson, (who was also tenant to the appellants,) for the tithe of sheaf - -	0	5	10

The only question made was concerning the rateability of fish; and this property having been always rated in the parish of Paul, and being a property yielding a certain annual profit, the sessions were of opinion that it was rateable, and confirmed the rate.—*Bearcroft*

A. D. 1789. and *Gibbs*, against the order of sessions. The parties ought only to be rated in respect of permanent and visible property within the parish. And as the other nine parts of the fish are not rateable, since the fishermen cannot be rated for their labour, the tenth part, which is paid as tithe, ought to be equally exempt.—*Erskine*, *Jekyll*, and *East*, contra, were stopped by the Court.—Lord *Kenyon*, Chief Justice. This question is decided by the express terms of the act of parliament (*a*); which, after mentioning parsons and vicars, in the number of the persons who are to contribute to the relief of the poor, enumerates, (among other things,) tithes impropriate, and propriations of tithes, in respect of which the rate is to be made. And indeed the spirit of the law coincides with the words of this statute. For the legislature intended that, when rates are made for the relief of the poor, every person should contribute according to the benefit which he receives within the parish. Here the parties receive a certain benefit arising from the tithe of fish in this parish, and run no risk whatever. Then it is said that only property, which is visible, should be rated: but I think that is carrying the rule of exemption too far; for oblations and other offerings, which constitute the rectorial or vicarial dues, are rateable.—*Buller*, Justice. Supposing the fishermen are not rateable for the fish caught, the Case of Rowls v. Gells (*b*) governs this. For though the owner of lead mines is not liable to be rated for them, yet his lessee, who runs no risk, is rateable in respect of the profits arising from lot and cope. So here the persons entitled to the tithe of fish run no risk, and their profit is certain: therefore, for that certain profit I think they are liable to contribute to the poor rates. Order of sessions confirmed.

(*a*) 43 El. c. 2 s. 1.

(*b* Cowp. 451.

Briggs v. Sir Frederick Evelyn. Hen. Bla. p. 114. A. D. 1792.

The lord of a manor who is also a justice of the peace, is entitled to a month's notice of an action brought against him, for taking away a gun in the house of an unqualified person, by Stat. 24 Geo. 2. c. 44. for it will be presumed that he acted as a justice.

Trover for a gun. The facts of the case were these: The plaintiff who was game-keeper of the manor of Effingham in Surrey, sent a gun to a blacksmith, between the 20th and 30th of August, 1791, to be mended. The blacksmith having repaired it, kept it some time in his house, but did not use it. The defendant, who was lord of an adjoining manor, in which the blacksmith lived, and also a justice of the peace, on the 17th of September went together with his own game-keeper to the blacksmith's house to search for guns and other engines used for the destruction of the game, and finding the gun in question, took it away. It was objected at the trial, that the defendant ought to have had a month's notice of the action, according to the Stat. 24 Geo. 2. c. 44. having acted as a justice of the peace, under the powers given by Stat. 5 Anne, c. 14. s. 4. and on that objection the plaintiff was nonsuited. A rule having been granted to shew cause, why the nonsuit should not be set aside, Mr. Justice *Gould* who tried the cause, stated the evidence, and that he was of opinion at the trial that the defendant was entitled to notice, having acted, though erroneously, in his character of a justice of peace. And he mentioned the Case of Stiles v. Coxe, Vaugh. 111. in which it was holden, that justices and other officers of the peace who acted in such official capacity, though wrong, were entitled to have the venue laid in the county where the trespass was committed, by Stat. 21 Jac. 1. c. 12.—*Bond*, Sergeant, shewed cause. The principle of Stiles v. Coxe, is applicable to the present case, *viz.* that justices and other peace officers are entitled to the favour of the law, where they have intended to act within the line of their authority, but by mistake have exceeded it, under which circumstances they are to have a month's notice of the action that they may have an opportunity of tendering

A. D. 1792. amends, and pleading the tender. Now the Stat. 5 Ann. c. 14. empowers a justice personally to seize any engine for the destruction of the game, in the custody of an unqualified person; the defendant under that power took the gun; and whether the taking were justifiable or not, he was entitled to notice by 24 G. 2. c. 44.—*Adair*, Sergeant, in support of the rule. Admitting the proposition that the provisions of the legislature were intended for the protection of persons supposed to have acted wrong, but in the exercise of a legal authority, yet here the defendant was not acting as a justice, and cannot therefore avail himself of that character; he acted as lord of the manor, and was attended by his game-keeper. The Statutes 22 and 23 Car. 2. c. 25. and 4 and 5 W. 3. c. 23. are the only acts which authorize the entering and searching houses for game and engines for the destruction of game: the first of these requires that there shall be a warrant from a justice of peace to the game-keeper to authorize the search; the second empowers the constable to enter and search, having a similar authority from a justice. But neither of them empower the justice himself personally to enter. The Statute 5 Anne, c. 14. indeed authorizes a justice of the peace to take away dogs, nets, or other engines from unqualified persons, but gives him no authority to enter houses; and that act purposely omits guns; which must be used for the destruction of the game, otherwise are not liable to be seized. There is no pretence, therefore to say, that the defendant in this case acted as a justice; and the Court will not extend the provision of the legislature, merely because he happened to be a justice of the peace, as well as lord of the manor.—But the Court said, that though justices of the peace could not avail themselves of their privilege as justices, where they acted in any other capacity which was diverso intuitu, yet as in the present case the subject matter was within their juris-

diction, the defendant was to be taken to have acted as a justice, and therefore entitled to notice, previous to the commencement of the action. Rule discharged. (*a*) A. D. 1792.

(*a*) See Lovelace v. Curry, 7 T. R. B. R. 631. that the Justice must have a month's notice of the precise writ or process intended to be sued out, as well as of the cause of action.

The King v. Beasdale and another. 4 *Term Rep.* 809.

This was a conviction on the Statute of 5 Ann. c. 14. s. 4. for using a greyhound to destroy game, without being qualified; for which the defendants were convicted in 5*l.* each; which the Court, without hearing any argument, said could not be supported; for that it was only one offence; and that the magistrate should only have convicted them in one penalty. That this question depended on the 5 An. c. 14. s. 4. which enacts "that if any person or persons, not qualified, &c. shall keep or use any greyhounds, &c. to kill and destroy the game, and shall be thereof convicted, &c. the person or persons so convicted shall forfeit the sum of five pounds." And they said that this point had been several times decided; in Hardman v. Whitacre (*a*), and in others. Conviction quashed.—*Wood*, in support of the conviction.—*Chambre*, contra.

Two persons cannot be convicted in separate penalties under 5 An. c. 14. s. 4. for using a greyhound to destroy game. See 2 Term Rep. 713. 3 T. R. 509. 5 T. R. 542.

(*a*) Bull. N. P. 189.

The Mayor and Commonalty of Orford v. Richardson and another. 4 *Term Rep. p.* 437. A. D. 1792.

Trespass for fishing in the plaintiff's free fishery and also in their several fishery in Orford Haven, Suffolk. Plea, that Orford Haven from time immemorial hath been, and is, an arm of the sea, in which every subject of this realm hath had and still ought to have the liberty of free fishing. Replication, that the corporation of Orford are a corporation by prescription and also by charter granted by Queen Elizabeth; and that the corporation have immemorially had and enjoyed, and still ought to have and enjoy, the exclusive liberty of dredging and fishing for oysters in the said place, &c.

To trespass for fishing in the plaintiff's fishery, defendant pleaded that the place is an arm of the sea, in which every subject has a right to fish: the plaintiff in his replication claimed an exclusive right by pre-

A. D. 1702

section, traversing the general right; held that the defendant ought to take issue on the traverse, and not to traverse the prescriptive right claimed by the plaintiff; for the first traverse is a material one, and will put in issue the true question in dispute between the parties.

at all seasonable times of the year, traversing that in the said arm of the sea every subject has a right of free fishing, &c. Rejoinder, that the place in which, &c. hath been immemorially an arm of the sea, in which every subject has a right of free fishing, traversing the prescriptive right claimed by the plaintiffs in the replication. Demurrer, because the plaintiffs in their replication traversed a material and issuable point of the defendant's plea, and by that traverse tendered to the defendants a material issue, but the defendants in their rejoinder did not take issue upon that traverse, or join in issue with the plaintiffs thereupon, but passed by and took no notice thereof, and traversed another part of the plaintiff's replication, and thereby attempted to put in issue another matter, and a matter alledged by the plaintiffs by way of inducement only to the traverse so made and taken by the plaintiffs, and thus attempted to introduce great uncertainty, confusion, and unnecessary length of pleading, &c.—*T. Walton* was to have argued in support of the demurrer: but the Court desired—*Baldwin*, contra, to begin; who endeavoured to support the rejoinder by saying that the traverse tendered in the replication was a matter of law, and that in such a case the defendant was at liberty to traverse the inducement to the plaintiff's traverse. It is not disputed but that where a material traverse is tendered, which will put the whole question in issue, the adverse party must take issue on it: but here the plaintiffs wished to traverse a mere matter of law, because in an arm of the sea every subject has a right primâ facie to fish. Carter v. Murcote, 4 Burr. 2162. Warren v. Matthews, Salk. 557. 1 Mod. 105. The defendants being subjects, have a primâ facie right to fish, without going into evidence to establish that right, but the party disputing that title must shew a prescriptive right in himself. And therefore the defendants offered a traverse of the special right in the corporation, which was the material issue to be

tried, namely, whether or not they had such a separate right as would take it out of the general rule of law. That there may be a traverse upon a traverse, when the first is not material, is clear from many authorities. In Mall Qu. Imp. 229. it is said that if the traverse tendered be not material in substance, the other party may traverse the inducement to such traverse, and need not take issue on the former traverse. Again in Hob. 104. "A man brings an action of waste for felling trees, and lays that the lessee felled and sold them: the defendant confesses that he felled them, but saith that he bestowed them in repairing the house, absque hoc that he sold them. The plaintiff may reply that he let them rot, or any like case of waste, absque hoc that he employed them to reparations, and this is traverse upon traverse." So in Crane v. The Bishop of Norwich (a) in quare impedit the plaintiff declared on a seisin in A. who conveyed to B. who conveyed to the plaintiff, and that afterwards the church became void; the defendant pleaded that before the conveyance to the plaintiff the church became void, and B. presented him, traversing that the church was void at any time after the conveyance to the plaintiff. The plaintiff replied that A. presented the defendant, traversing that B. presented him. That was a traverse of the inducement to the defendant's traverse, and held good.—Lord *Kenyon*, Chief Justice. It seems clear from the cases cited, that, where a traverse is tendered, which is not calculated to try the right in question, the other party need not take issue upon it, since it would be a nugatory issue. But it is admitted that there cannot be a traverse upon a traverse, when the first will decide the whole question. And this does not depend on any arbitrary or capricious rule, but is founded on good sense and reason; otherwise pleading would answer no other purpose than that of lengthening the record. With regard to the question

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(a) 2 Lutw. 1682.

A. D. 1792. of law in this case, as to the right claimed by the plaintiffs, there can be no doubt but that there may be a prescriptive right in a subject to a several fishery in an arm of the sea. Here then after the defendants had pleaded that the place in question was an arm of the sea, in which every subject has a right of fishing, the plaintiffs replied a prescriptive right in themselves, "without this, that in the said arm of the sea every subject has a right of free fishing, &c." That was saying in other terms, "The right of fishing in this place does not stand on the general public right, but on special grounds derogatory from the general law." That traverse necessarily involved in it the real question in dispute between the parties, and consequently the defendants should have taken issue upon it.—*Ashhurst*, Justice. It is clearly established that, wherever the point in question is traversed by one party, the other must take issue upon it, for they are not to go on in infinitum. The use of pleading is to bring the matter in litigation to one point. And there cannot be any doubt here but that the merits of this case might have been fairly tried on the first traverse. But it has been objected that this was a traverse of the law: that argument would have been well founded if there could be no prescription against the general right: but, as it is clear that there may be a prescription to take away the general right of the public in an arm of the sea, the traverse tendered by the plaintiffs would put in issue the real question between these parties; for it is founded on an antecedent fact introduced into the replication, which, if true, would defeat the general right upon which the defendants relied.—*Buller*, Justice. The defendants counsel has endeavoured to support the second traverse on two grounds; first, because the traverse tendered by the plaintiffs is a matter of law; and secondly, because it is immaterial. The first is answered by saying that this is to be sup-

ported by evidence, and is not mere matter of law. A. D. 1792.
And as to the other ground, the rule of pleading has been truly stated, that, if the first traverse tendered be immaterial, the adverse party may add another traverse. Then with regard to the materiality of the plaintiffs traverse, the fair question might have been as well tried on the first, as on the second, traverse. For one party is to prove that this is an arm of the sea, in which primâ facie every subject has a right to fish; the other is to establish a prescriptive right, which destroys the general right. And if the point in litigation come directly to be tried on either of these issues, it must be tried on that traverse which is first tendered. It is like the case of a traverse where the life or death of another person is to be put in issue: if the first traverse tendered be that the party is dead, issue must be taken on that; or vice versa; because either of these traverses will bring the same question to trial. The Case cited from Hobart (*a*) is distinguishable from the present. There the defendant tendered an immaterial traverse; the cutting down the trees was the wrong, and it was immaterial to the merits of that case whether the tenant had or had not sold them.—*Grose*, Justice, declared himself of the same opinion. Judgment for the plaintiffs. Judgment reversed, see 5 T. R. 367.

(*a*) This was not the principal case in Hobart, but is only cited from 5 Ed. 4. 100. B. And Hobart, Chief Justice, in commenting upon it, said "This first traverse was not material, nor to a point material, for the plaintiff might have declared of the selling only, and the other point was mere surplusage. And therefore though perhaps if the plaintiff had joined issue upon it, and it had been found for him, he should have had judgment, yet clearly he was not bound to take issue on the plea, as not final to the action; and therefore the plaintiff might have demurred upon the defendant's plea, as resting upon a thing not material.

Richardson and another v. *The Mayor and Commonalty of Orford.* 2 *Hen. Bla. p.* 182. A. D. 1793.

This was an action of trespass, in which the declaration contained five counts: 1. For fishing in the several 1 Anstr. 231. S. C. To an action

A. D. 1703. Action of trespass for fishing in the plaintiff's fishery, the defendant pleaded that the locus in quo was an arm of the sea, in which every subject of the realm had the liberty and privilege of free fishing. The plaintiff replied a prescription for the sole and several right of fishing, and traversed that every subject had the liberty and privilege of free fishing in the locus in quo. This was a bad traverse. The defendant therefore might well pass it by in the rejoinder, and leave to the prescriptive right of the plaintiff, stated in the replication.

fishery of the plaintiffs in a certain haven called Orford Haven, and the fish, to wit, 10,000 bushels of oysters of the said plaintiff's there being found and caught, seizing, taking and carrying away, and converting, &c. 2. For fishing in the free fishery of the plaintiffs in a certain haven called Orford Haven, &c. &c. 3. For fishing in a certain other several fishery of the plaintiffs in a certain river called Orford River, &c. &c. 4. For fishing in a certain other free fishery of the plaintiffs in a certain river called Orford River, &c. &c. 5. For taking the fish of the plaintiffs. Plea, Not Guilty. 2. That the places and fish in the several counts mentioned were the same, and that the said place in which, &c. "in the said declaration mentioned, now is, and at the said several times when, &c. was, and from time whereof the memory of man is not to the contrary, hath been an arm of the sea, in which every subject of this realm at the said several times when, &c. in the said declaration mentioned, had and ought to have had, and yet hath and still ought to have, the liberty and privilege of free fishing; wherefore the said John and William, (the defendants,) being subjects of this realm, at the said several times when, &c. in the said declaration mentioned, fished, &c. &c." The third plea was the same in all respects as the second, except that it alledged the locus in quo to be a public navigable river, in which the tide and water of the sea flowed and reflowed, in which every subject of the realm had a right to fish, &c. The first replication, as to so much of the second plea as related to the fishing in the haven in the first count, and the taking, &c. and in the river in the third count of the declaration mentioned, and the taking, &c. &c. (i. e. as to the fishing in the plaintiff's several fishery) was, "That the town of Orford, in the county of Suffolk aforesaid, now is, and from time whereof the memory of man is not to the contrary, hath been, a

antient town, and that the inhabitants of the said town now are, and from time whereof the memory of man is not to the contrary, have been a body corporate and politic, in deed, fact, and name, and have at various times for and during the time aforesaid, until the 7th day of July, in the 21st year of the reign of the Lady Elizabeth, late Queen of England, been called and known by various names of incorporation, to wit, by the name of the Honest Men of Orford, and also by the name of the Burgesses of the town of Orford, and since, after the said last mentioned day, by the name of the Mayor and Commonalty of the borough of Orford, to wit, at Orford aforesaid, in the county aforesaid: and the said mayor and commonalty further say, that the said body politic and corporate from time whereof the memory of man is not to the contrary, until a d at the said several times when, &c. in the said first and last count mentioned, have had and enjoyed, and have used and been accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the sole and several right, liberty and privilege, of dredging and fishing for, and catching and taking oysters in the said place, in which, &c. to wit, at Orford aforesaid, in the county aforesaid, without this, that in the said arm of the sea, in which, &c. every subject of this realm, at the said several times when, &c. had, and ought to have had, the liberty and privilege of free fishing, in manner and form as the said John and William have in their said last mentioned plea above alledged; and this the said mayor and commonalty are ready to verify," &c. The second replication to the residue of the second plea, which related to the fishing in the haven in the second count, and the taking, &c. and the fishing in the fourth count, and the taking, &c. &c. (i. e. as to the fishing in the plaintiff's free fishery) stated the prescription to be, "that the A. D. 1793.

A. D. 1793. plaintiffs have had and enjoyed, and have used and been accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the free liberty and privilege of dredging and fishing for and catching and taking oysters in the said places in which, &c. every year at all seasonable times of the year, at their free will and pleasure, to wit, at Orford aforesaid, in the county aforesaid," and concluded with a traverse precisely the same as the 1 st. The third and fourth replications, which related to the third plea, contained the same matter of inducement as the first and second, and each concluded with a similar traverse, of the right of every subject of the realm to fish in the said river, &c. Then followed some new assignments, not material to be stated. In the first rejoinder " the said John and William as to so much of the said plea of the said mayor and commonalty by them by way of reply pleaded to the said plea of the said John and William by them secondly above pleaded in bar, as relates to the fishing in the said haven called Orford Haven, in the said first count of the said declaration mentioned, and the fish then and there found and being, catching, seizing, taking and carrying away, and converting and disposing thereof to their own use, and to fishing in the said river called Orford River, otherwise the river Ore, in the said third count of the said declaration mentioned, and the fish then and there found and being, catching, seizing, taking, and carrying away, and converting and disposing thereof to their own use, and to seizing and taking the said fish in the said last count of the said declaration mentioned, and carrying away the same, and converting and disposing thereof to their own use, say, that the said mayor and commonalty by reason of any thing in that plea alledged, ought not to have or maintain their said action against the said John and William, because pro-

testing that the said town of Orford is not, nor from time whereof the memory of man is not to the contrary hath been, an antient town, protesting also that the inhabitants of the same town are not, nor from time whereof the memory of man is not to the contrary have been, a body corporate and politic in deed fact and name, in manner and form as the said mayor and commonalty have in their said replication in that behalf alledged, they the said John and William as before say, that the said place, in which, &c. in the said declaration mentioned, now is, and at the said several times, when, &c. was, and from time whereof the memory of man is not to the contrary hath been, an arm of the sea, in which every subject of this realm, at the said several times when, &c. in the said declaration mentioned, had and ought to have had, and yet hath and still ought to have the liberty and privilege of free fishing, without this, that the said body politic and corporate, from time whereof the memory of man is not to the contrary, until and at the said several times, when, &c. in the said first, third and last counts mentioned, have had and enjoyed, and have been used and accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the sole and several right, liberty and privilege of dredging and fishing for, and catching and taking oysters, in the said place, in which, &c. in manner and form as the said mayor and commonalty have in their said replication to such part of the said 2d plea of the said John and William above alledged, and this the said John and William are ready to verify, &c." The other rejoinders were similar, mutatis mutandis. Special demurrer, "For that the said mayor and commonalty have in and by their said plea, so by them above pleaded by way of reply as aforesaid, traversed a material and issuable point of the said plea of the said John and William so by them

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A. D. 1793. above pleaded in bar, and by that traverse tendered to the said John and William a material issue, but the said John and William have not, in and by their said plea, so by them thereunto pleaded by way of rejoinder, taken issue upon that traverse, or joined in issue with them the said mayor and commonalty thereupon, but have passed by and taken no notice thereof, and have traversed another part of the said plea of the said mayor and commonalty, so by them above pleaded by way of reply, and have thereby attempted to put in issue another matter, and a matter alledged by the said mayor and commonalty by way of inducement only to the said traverse, so made and taken by the said mayor and commonalty, and have thereby attempted to introduce great uncertainty, confusion, and unnecessary length of pleading, &c." The assignment of errors was, "There is error also in this, that judgments were given for the said mayor and commonalty against the said John and William upon the several demurrers in the record and proceedings aforesaid, whereas judgments ought to have been given on those demurrers for the said John and William against the said mayor and commonalty, inasmuch as the places in which, &c. being admitted upon the said record and proceedings to be arms of the sea, or a public navigable river, in which the tide and water of the sea flowed and reflowed, the several traverses in the record and proceedings aforesaid, tendered by the said mayor and commonalty, are traverses of mere inferences of law, and therefore are immaterial traverses; and inasmuch as the traverses in the record and proceedings tendered by the said John and William are traverses of the several prescriptions of the said mayor and commonalty, whereon alone the title of the said mayor and commonalty to the fisheries in question, and consequently to maintain this action depends, and therefore are the only material traverses to

be taken and tendered." This case was twice argued, the first time in Easter term, by *Wood* for the plaintiffs in error, and *Chambre* for the defendants; the second, in the present term by *Bower* for the plaintiffs, and *Le Blanc*, Sergeant, for the defendants. After which, Lord Chief Justice *Eyre* said, shortly in the name of the Court, that they had sent this Case to a second argument, rather from an unwillingness to adopt, without great deliberation, a decision contrary to that of the Court from whence the record came, than from any difficulty they saw in the question. For from the moment it appeared, that upon the pleadings the plaintiffs might have recovered a verdict in an action of trespass, without having either possession or right, it seemed very difficult to support the judgment. That the first traverse was of the right of all the king's subjects to fish in the arm of the sea, stated by the defendants; now this was clearly a bad and immaterial traverse, for it was not only a traverse of an inference of law, but it was so taken, that if at the trial it had been proved that it was the separate right of others, and not of the plaintiffs, the issue must have been found for the plaintiffs, not only without their being obliged to prove either possession or right, but where in fact they had neither possession nor right. That an immaterial traverse might be passed over, and the matter of the inducement traversed; which had been properly done in this case by the defendants. Judgment reversed. A. D. 1792.

Calcraft v. Gibbs. 4 *Term Rep. p.* 681. A. D. 1792.

To this action, on the Statute of Anne, for keeping and using a gun for the destruction of game, without being qualified, and also for shooting without a certificate, the defence made at the trial at Maidstone, before *Gould*, Justice, was under a deputation, granted by Mr. 5 T. R. 19. S. C. It is no defence to an action for penalties on the Game Laws

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that the defendant has a deputation from a person claiming to be lord of the manor, if there appear to be no ground for the claim.

Roebuck, as lord of the manor of North Fleet. The plaintiff produced a grant from the crown to him of the manor of North Fleet; and the defendant had purchased Ingress of him, which lies within this manor. The learned Judge thinking that the question respecting the boundaries of a manor ought not to be tried in an action on the Game Laws, the plaintiff was nonsuited, but he had leave to move to set it aside.—*Shepherd* on a former day moved to set aside the nonsuit, on the ground that Mr. Roebuck had not only no title, but not even a claim of title to the manor; for that the granting of this deputation was his only exercise of right.—*Bond*, Sergeant, was to have shewn cause against this rule: but the Court thought the point too clear for argument; for that though the judges at Nisi Prius had frequently refused to enter into a minute* discussion of the boundaries of manors in actions on the Game Laws, one instance of which was mentioned as having happened some years ago at Stafford, before Lord Chief Justice *Wilmot*, yet that in the present case there was no pretence of title in Mr. Roebuck. And therefore they made the rule absolute (*a*).

* See this rule observed upon, 8 East. Rep. 179.

(*a*) Hankins v Bailey, Bridgewater Summer Assizes, 1791. In an action for a penalty under the Game Laws for shooting a pheasant, Buller, Justice, nonsuited the plaintiff; it appearing that the defendant was game-keeper of Sir Richard Hoare of his manor of Bruton, and had, as such, constantly shot over the place where the pheasant was killed; no evidence being given that the place was out of the manor. And he said he would not put it upon the defendant to prove that the place was within the manor, (though pressed by the plaintiff's counsel so to do,) for that he would not in such an action try the boundaries of the manor.

Blunt v. Grimes, Salisbury Spring Assizes, 1789. This was an action of debt brought for penalties under the Game Laws. The killing being proved, it appeared that the defendant was game-keeper to Lord Shaftesbury, and that Lord Shaftesbury was owner of the lands where the game had been killed.—Bond on his behalf, opened a case of title to the manor in Lord S. and derived it through several ancient deeds as far back as the reign of Queen Elizabeth. Besides which he offered to shew a seisin in fact of Lord S. and his ancestors, by repeated acts of ownership, and exercise of manerial rights, by felling timber on the wastes, &c. as far as the oldest witnesses could remember, which would be sufficient in this case.— Morris, for the plaintiff, interrupted him, by saying, that he knew of no distinction intended to be taken between the evidence in this case and any other. That this action had been agreed

to be brought between the parties expressly to try the right to the manor in question; that they were aware that Lord S. had exercised acts of ownership, which was the very thing complained of; and that the plaintiff was ready to prove by ancient writings and records, that the plaintiff was lord of the manor. — Buller, J. observed that it was not competent to the parties to enter into any such agreement; nor should he give his assent to it. He was clearly of opinion that this was a very improper mode of trying the ancient right to the manor. For he should hold that if the defendant proved only a colourable title in Lord S. as lord of the manor, and the exercise of those manerial rights in fact, which had been opened, that would be a sufficient defence against the penalties of the act, and he should direct the Jury to find for the defendant.— Whereupon, by agreement, the record was withdrawn.

Caleraft v. Gibbs. 5 *Term Rep. p.* 19. A. D. 1792.

It is no defence to debt for penalties on the Game Laws that the defendant acted bona fide as game-keeper of the manor in which the offence was committed, under a deputation from a person claiming a right to appoint the game-keeper, there being no ground for the claim. A new trial may be granted after verdict for defendant in a penal action if the jury have been misdirected in point of law.

This cause, which was an action of debt for a penalty under the Game Laws, went down to trial a second time according to the rule made by the Court for that purpose, (ante, 1243. 4 Term Rep. 681.) when it was further proved by the defendant, as the servant of Mr. Roebuck, under whose directions he acted, though without any indemnity from him, that when Roebuck purchased the estate of the plaintiff in 1788, it was agreed that the former should have the deputation of the manor of Northfleet, of which the plaintiff was lord, and in which the estate purchased was situated. That the last certificate which had been granted to any one as game-keeper to the plaintiff for this manor was in the same year of 1788. That in 1790 and 1791 certificates had been granted to the defendant as game-keeper to Mr. Roebuck for this manor; and as such game-keeper, and by the particular orders of Roebuck, he had continued to shoot there after having been warned by the plaintiff to desist. Mr. Sergeant *Runnington*, who tried the cause at the last Kent assizes, directed the Jury, that if they were satisfied that the defendant had acted bonâ fide as Roebuck's game-keeper, under his direction, and ignorant of the nature and extent of his claim to sport over the manor in question, they should find a verdict for him, on the ground that this was not a proper form of action for trying disputed claims. On this the Jury

A. D. 1792. found for the defendant. *Shepherd* obtained a rule to shew cause why there should not be a new trial, on account of a misdirection in point of law; for that if the right were clear, and there were no colour for a dispute about the title to the manor, it was perfectly immaterial from what motive the defendant had acted.—*Bond*, Sergt. now shewed cause; insisting that the agreement between Roebuck and Calcraft was a sufficient ground of claim at least to defeat this mode of procedure. That the Game Laws were passed against poachers, persons wilfully encroaching on the property of others; not against such as really believed they were only acting in the assertion of a right, however well or ill founded that might afterwards prove. That such was the situation of the defendant; and that he having obtained a verdict under that impression, the Court would not set it aside in the case of a penal action so circumstanced as the present.—Lord *Kenyon*, Ch. J. If this case had been properly left to the Jury, and they had even drawn a wrong conclusion, we should not have been disposed to grant a new trial in such an action as the present. But where there is any ground of objection to the Law delivered by the Judge, on which the verdict has proceeded, if such objection be well founded, it is immaterial what the nature of the cause is. The application for a new trial is a direct appeal to the justice and laws of the country, and cannot be tried and disposed of by any other rule. The Court before declared, as they now do again, that where a party has even a colourable title only to a manor, a penal action is not a mode of proceeding by which they will investigate it But here nothing of the sort is even pretended: for it is admitted on the part of the defendant that the plaintiff was the lord of the manor. But it is insisted that he promised the deputation of it to Mr. Roebuck at the time of the purchase of the estate,

Kinnersley v. Orpe. Doug. 517, 8.

under whom the defendant acted. Now that decides the question at once; for a man cannot convey to another the power of appointing a game-keeper without a conveyance also of the manor itself. Such a power is a mere emanation of the manor, and inseparable from it. It is a mere shadow, accompanying the substance. But it has been said further that the defendant acted bona fide, and therefore had not incurred the penalty of the statute. The servant indeed chose to trust to what his master told him upon the subject; but as the master had no right to the manor, or even colour of title, it is no justification to the servant. I am therefore of opinion that the directions given at the trial cannot be supported, and consequently that there must be a new trial.—*Grose*, J. *(a)* All that the Courts have hitherto said upon this subject is, that if there be a fair colourable title in the party, they will not suffer it to be tried in this form of action. But were we to go further, and declare that, because a defendant acted bona fide, it was a sufficient excuse in this action, it would operate almost as a total repeal of the statutes inflicting these penalties. Therefore, whether the defendant acted bona fide or not, if he had no colour of title, it could never be a proper consideration to be left to the jury, and the verdict which proceeded on such misdirection, in point of law, must in consequence be set aside. Rule absolute. A. D. 1792.

(a) Abs. Buller, J.

Molton v. Cheeseley. 1 *Espinasse's Rep. p.* 123. A. D. 1783.

This was an action of debt *(a)* brought to recover from the defendant two penalties of 5*l.* each, under the Statute 5 Ann. 14. The first was for having a pheasant in his possession, he not being a person qualified by the

See 10 East. 21. In an action of debt to recover the penalties under the Game Laws, the

(a) By Stat. 8 Geo. 1. 19. "Where any person shall be liable to any penalty under the Game Laws, by conviction before a justice of peace, it shall be lawful for any person either to proceed to recover the said penalty by information before a justice, or to sue for the same by action of debt."

A. D. 1788. laws of the realm to kill game. The second was under another clause of the same statute, for keeping a dog for killing and destroying the game, which inflicts a penalty of 5*l.* on the offender. When the case was opened, Mr. Justice *Buller* ruled, that the plaintiff could go for one penalty only; for that both being offences in the same act of parliament for which penalties are given, that the plaintiff can recover but one penalty under the same statute. The case then proved on the part of the plaintiff was, that a pheasant had been killed by accident by the defendant's dog, but that he had carried it away. *Buller*, Justice, said, that if it appeared that the bird was killed by accident, that that was no offence, but that in such case it should be left where it was killed; for if it was taken away, it subjects the party to the penalty for having game in his possession. The plaintiff therefore recovered one penalty of 5*l.* for this offence.

plaintiff can recover but one penalty under the same statute. Qu. Vid. Brook v. Milliken, 3 T. R. 509. cont. should it not be the two penalties cannot be recovered where the offences are both occasioned by the same act of the defendant, the pheasant having been killed and come into his possession by his having kept the dog to kill game,

for which reason perhaps it was that the facts of keeping the dog and having the pheasant in his possession were not sufficiently distinct to entitle to two penalties.

If a person not qualified to kill game, kills a pheasant or other game by accident, he cannot take it away, or he is subject to the penalty.

A. D. 1795. *The King v. T. Davis.* 6 *Term Rep. p.* 177.

Proof that the defendant "did keep and use a gun to kill and destroy the game" is sufficient evidence to support a conviction on the Game Laws, though the witness had his reason for believing it, "that the gun was fired by the defendant, who

This was a conviction on the Statute 5 Ann. c. 14. s. 4. for keeping and using a gun for the destruction of game. It appeared on the conviction, that on, &c. at, &c. "one credible witness, to wit, Reginald Pyndar of Hadsor aforesaid (where the offence was committed,) upon his oath, &c. in the presence of the defendant, deposed, &c. that the aforesaid T. Davis on, &c. at, &c. not then, to wit, on, &c. having lands and tenements, nor any other estate of inheritance in his own or his wife's right, of the clear yearly value of 100*l.* per ann. &c. did keep and use a certain engine called a gun, with intent to kill and destroy the game; and that he (the witness) was satisfied that the said T. Davis did

A. D. 1795.

keep and use the said gun for the purpose aforesaid, from the circumstance of his hearing a gun go off, and observing that it was fired by the said T. Davis, who was then walking about a piece of ground in the parish of Hadsor aforesaid, with that apparent intent, &c." *Erskine* and *Lane* took two objections to the conviction; 1st, That Pyndar, on whose evidence alone the conviction was founded, was an incompetent witness, because he was an inhabitant of the parish of Hadsor, where the offence was committed, and to which parish part of the penalty was given. 2dly. But even if he were a competent witness, the evidence given was not sufficient to support the conviction. The evidence is that the defendant "did keep and use a certain engine called a gun, with intent to kill and destroy the game." If this had been a dog or snare, this evidence perhaps would have been sufficient: but the defendant may have kept and used a gun for a variety of purposes besides that of killing game. Keeping or using a gun is not of itself an offence within the act. R. v. Gardiner (*a*): it must be kept or used with an intent to kill game; and though the witness has undertaken to swear to the defendant's intention, that is not sufficient, if the reason on which his oath is founded do not warrant such a conclusion; now the only reason assigned by the witness is, that the defendant fired a gun, and "walked about a piece of ground with that apparent intent." But it is not even hinted that the gun was fired at game; and the apparent intent to kill game cannot be collected from the mere circumstance of a person carrying a gun.—Lord *Kenyon*, Ch. J. (stopping *Bower* contra). The first objection is answered by the Statute 7 Geo. 3. c. 29. which was passed to prevent difficulties of this kind, and to enable inhabitants and parishioners to give evidence in prosecutions where the penalty is given to the parish, provided the penalty do not

was walking about a piece of ground at H. with that apparent intent." If there be any evidence tending to prove an offence over which a magistrate has a summary jurisdiction by conviction, this Court cannot judge of the degree of it, or controul the determination of the magistrate upon that evidence. By Stat. 27 G. 3. c. 29. parishioners are made competent witnesses in prosecutions, where the penalty is given to the parish, unless it exceed 20*l*.

(*a*) Andr. 255. and 2 Stra. 1098.

A. D. 1795. exceed 20*l*. With regard to the other objection, here was evidence tending to prove the offence. That being the case, we have no authority to examine further, and see whether the conclusion drawn by the magistrate be or be not inevitable conclusion from the evidence. It is sufficient in convictions, if there were such evidence before the magistrate as in an action would be sufficient to be left to a jury: here we cannot say that there was no evidence of the fact for the consideration of the magistrate. In the Case of R. v. Gardiner, the defendant was only charged "with having and keeping a gun, being an engine for destroying game."—*Grose* J. In the case of R. v. Thompson (*a*), the evidence was that the defendant "did keep and use a gun to kill and destroy the game," which the Court decided to be sufficient evidence. I did not agree to the determination at first: but the Court thought we should overturn all former precedents if we did not support the conviction, and on that ground I afterwards concurred in opinion with the rest of the Court. Conviction affirmed.

(*a*) 2 T.R. 18

A. D. 1794. *Lacon et al' v. Hooper et al'.* 1 *Esp. Rep. p.* 246.

Constructions upon several parts of the Statutes 26 G. 3. and 28 G. 3. regulating the Southern Whale Fishery.

The plaintiffs in this action were the joint-owners of the ship Trelawney, a vessel employed in the southern whale fishery. The defendants were the commissioners of the customs: this action was brought for the purpose of ascertaining the plaintiffs claim to certain bounties given for the encouragement of that fishery. By Stat. 26 Geo. 3. and 28 Geo. 3. two statutes by which the trade to the South-seas, for the whale fishery is regulated, a bounty of 700*l*. is given to the first five ships with the greatest quantity of oil and head matter that should arrive in England. These ships in order to entitle them to the bounty, are, by the act of parliament, to sail within the first of January and the first of November, and to be out on their respective voyage

not less than fourteen months nor more than twenty-eight; and to return before the thirty-first of December: they are to carry out an apprentice for every fifty tons, and back again, unless it shall appear that the apprentice either died or deserted; and the vessel must be registered under Lord Hawkesbury's Act. These matters are to be verified by affidavits of the master, mate, and two of the mariners: pursuing these regulations, and obtaining a certificate from the commissioners of the customs, to the collector of the port to which the vessel belongs, they are entitled to receive the bounty. This was claimed by the plaintiffs, and by another ship making the same claim: the commissioners of the customs were only stake-holders, and of course nominal defendants only in this action. The facts of the case were, that the ship Trelawney sailed from Yarmouth on the 29th October 1789, and returned from her voyage in December 1790, on the 27th of which month she arrived in Carton Bay, a small port in Norfolk, and on the 29th arrived at Yarmouth. The first question arose upon the clause in the act of parliament, requiring the vessel to be out not less than 14 months.—*Erskine* of counsel for the plaintiffs contended, that the vessel had been out the time required by the act of parliament. He insisted that her coming to Carton Bay could not be deemed the completion of her voyage, it being merely the touching at a port, where no duties were ever taken, on her return to the port of Yarmouth, from whence she had sailed, which she reached on the 29th of December, and which from the 29th of October of the preceding year, made exactly fourteen months.—But even should it be held, that the vessel's arrival at Carton Bay, on the 27th of December, should be deemed her return to England, which would be two days short of the computation of fourteen calendar months, he contended, that the vessel was entitled to the bounty,

A. D. 1794.

Where the statute requires the ship to be absent 14 months, this means lunar, not calendar months.

A. D. 1791. inasmuch as the act of parliament had used the word "months," generally, and this must mean lunar months, by which computation the vessel would have been out five weeks above the fourteen months required by the act.—The Attorney General (Sir *John Scot*), on the other side contended, that the ship's arrival at Carton Bay should be deemed an arrival in England, though no duties were in fact collected there, as it was within the exchequer survey of the port of Yarmouth, and was therefore to be considered as a member of it.—To this Lord *Kenyon* assented.—As to the time, the Attorney General contended, that at the custom-house, in all cases of bounties or such like limitations as to time, the uniform and established rule adopted there was to construe "months," as calendar, and not lunar months.—Lord *Kenyon* said, that the ideas of the officers of the customs were not to regulate the Courts of Westminster-hall, in the construction of acts of parliament: that in the present case the legislature had used the word "months" generally. That in the uniform legal construction, a month so generally described was a lunar month, unless the context required a different construction, and he therefore was of opinion, in the present instance, that the ship had conformed to the act of parliament, and had been out on on her voyage the legal time required by it.—The Attorney General then adverted to other parts of the act of parliament, imposing particular regulations and restrictions on the vessels, going on this trade, without such vessels were entitled to receive the bounty. One of these is, "that every vessel so engaging in such trade shall take on board for the said voyage one apprentice for every *fifty* tons burthen, and that such apprentice so taken, at the fitting, clearing, and sailing of the said ship was on board, and so continued during the voyage, unless such apprentice should die or desert

Where the statute requires that the vessel should carry out an apprentice for every 50 tons, and that it shall be veri-

the ship, which should be verified by the oaths of the master, mate, and two of the mariners." The evidence to this was, the muster-rolls of the vessel, at the time of clearing of the said vessel, and at her return to Yarmouth; in these muster-rolls the names of five apprentices appeared, the ship carrying 295 tons at the time of her clearing, and at her return one was marked "dead," another "deserted;" these muster-rolls were verified by the affidavits of the master, mate, and two of the mariners. The counsel for the defendants objected to this evidence, on the ground that the affidavit was informal, and also did not substantially satisfy the directions of the statute. They contended that the words of the statute ought to have been followed, stating that the facts as to the number of apprentices, their sailing, and continuing on board during the voyage, and their death or desertion, if such happened; but that even was the affidavit in question sufficient in point of form, it did not satisfy the directions of the statute. They contended, that the object of the act being, that apprentices should go the voyage, it was material to see that they had done so; that the oath should therefore state their sailing and continuing on board during the voyage, whereas the oath here was only that, at the time of clearing, there was the proper number, but as a considerable interval might elapse between the clearing of the vessel, and her sailing, and the statute required her to have the number at the time of her sailing, that the affidavit was substantially bad, as the apprentices might have died or deserted between the clearing and the sailing of the ship. —*Erskine*, for the plaintiff, answered, that the form of the affidavit was prepared by the officer of the customs at the port from whence the vessel sailed, and where she arrived, and that therefore it was not competent for the defendants to object to it, for an informality proceeding from one of their own officers. As to the sub-

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fied by affidavit, the muster-roll containing the account of such apprentice, at the sailing and return of the ship, and sworn to as directed, is sufficient.

A. D. 1794. stance, he contended, that having the number of apprentices prescribed by the statute, at the time of clearing, was sufficient, and that the muster-rolls, as verified by affidavit, were complete evidence.—Lord *Kenyon* said, that he was of opinion the evidence offered was sufficient to satisfy the requisition of the act of parliament; that the oaths which had been made in this case were such as the statute required, and established the truth of the muster-rolls; and as the one, at the time of clearing, had contained the names of five apprentices, and the other, at the ship's return, had accounted for the defect of two, the one in consequence of death, the other of desertion, that it was therefore a fair inference, that the vessel had carried out the proper number of apprentices on the voyage, nor should they presume that the death or desertion of the apprentices happened between the time of the ship's clearing and sailing. His Lordship therefore upon that head ruled, that the regulation in that respect prescribed by the statute had been conformed to, and the plaintiffs entitled to recover.—*Erskine*, *Mingay*, and *Alderson* for the plaintiffs.—The Attorney General, *Bearcroft*, *Bower*, and *Wood* for the defendants.

A. D. 1797. *The King v. Lovet.* 7 *Term Rep. p.* 152.

It is no objection to an information on the Game Laws that it is not qui tam. On an information charging the defendant with keeping and using a dog, and also a gun on the same day, he can only be convicted in

This was an action before a justice of the peace on the Game Laws. The information of J. Allgood stated, that the defendant on the 5th of September 1796, at, &c. "did keep and use a certain dog called a setting-dog, and also a certain engine called a gun, to kill and destroy the game, against the form of the statute, &c.;" without praying that he might have a moiety of the forfeiture, or saying for whom he sued. It further appeared on the conviction that on the 16th of September the defendant appeared in person and pleaded not guilty; and that on the said 16th of September

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a credible witness, &c. swore that the defendant on the 5th of September, at, &c. "did keep and use a certain dog called a setting-dog, and also a certain engine called a gun, to kill and destroy the game;" whereupon the defendant was convicted; and he was adjudged "for his offence aforesaid to have forfeited 5*l.* to be distributed as the statute directs." *Law* and *Holroyd* took three objections to the conviction. 1st. The information is not qui tam; it is only for the informer, and not for the parish. 2dly. The information charges the defendant with two offences, "keeping and using a dog, and also keeping and using a gun," and he is only convicted of one "for his offence aforesaid." Therefore it is uncertain of which he is convicted, and he could not plead this conviction in bar to any action or prosecution commenced against him for either. This is not like a charge of keeping and using a gun on the same day, which is only one offence; it is for keeping and using a dog, and also for keeping and using a gun; now the bare keeping of a dog for the destruction of game is a separate offence, and using a gun is another, and for any thing that appears on this conviction they may have been distinct offences in this instance. 3dly. It does not appear that the evidence was given in the presence of the defendant. R. v. Vipont, 2 Burr. 1165. and R. v. Crowther, 1 Term R. 125. It does not follow that, because the evidence was given on the same day when the defendant pleaded, he was present when it was given.—Lord *Kenyon*, Ch. J. stopping *Wood*, who was to have argued in support of the conviction) said that none of the objections are well founded. As to the first; the precedents agree with this information *(a)*. With regard to the second; the defendant is only charged with one offence, and therefore could only be convicted of one. If a person

one penalty. If the evidence be given on the same day that the defendant appeared and pleaded, it will be intended that the evidence was given in his presence.

A magistrate should state all the evidence in the conviction, and not merely the result of it.

(a) Vid. 2 Hawk. c. 26. s. 20.

A. D. 1797. go in pursuit of game with a dog and gun on the same day, he can only be convicted in one penalty. On the third objection perhaps I should have had great doubts, if this were res integra. But as it was so lately decided in this Court in R. v. Thompson (*a*), that where the evidence is given on the same day when the defendant appeared, it will be intended that the evidence was given in his presence, and as that precedent may have guided the magistrates on similar occasions since, I am inclined to support this conviction. Per Curiam. Conviction affirmed (*b*).

(*a*) 2 T. R. 18.

(*b*) A criminal information was moved for against Mr. Tweedale the magistrate, who made the conviction, for not stating all the evidence given. In fact a good deal of evidence was given on behalf of the defendant to shew that he was game-keeper of a certain manor, which the magistrate thought insufficient for the purpose, and convicted the defendant, only stating in the conviction, in the language of the act of parliament, that "on, &c. the defendant did keep and use, &c." without stating the particulars of the evidence, and wholly omitting the evidence given for the defendant. But the Court, after hearing the affidavits on both sides, being of opinion that the magistrate had not acted corruptly, but might have been misled by the precedent in R. v. Thompson, discharged the rule; expressing in strong terms that they thought it the duty of magistrates in all cases to state the whole of the evidence, and not merely the result of it.

The King v. Harris. 7 *Term Rep. p.* 238.

If a conviction do not state an adjudication, it cannot be supported, whether the punishment be or be not fixed by statute. Whether the stat. 1 Jac. 1. c. 27. be repealed by the stat 22 & 23 Car. 2. c. 25.? Qu.

This was a conviction on the Stat. 1 Jac. 1. c. 27. for killing two hares with a gun. The conviction, after setting forth the information, summons, plea, and the evidence, concluded thus, "Whereupon all and singular the premises being seen and fully understood, &c. it appears to us the said Justices that the said J. A. Harris is guilty of the offence charged upon him in and by the said information; and thereupon it is considered and adjudged by us the said Justices that the said J. A. Harris be convicted, and he is hereby convicted by us the said Justices by the testimony of, &c. of the offence charged upon him in and by the said information, according to the form of the statute in such case made and provided." By the Statute 1 Jac. 1. c. 27. s. 2. it is en-

acted that every person who shall shoot at, kill or destroy with any gun, &c. any hare, &c. (the same being proved, &c. before two Justices, &c.) shall be by the said Justices committed to the common gaol of the said county, &c. for three months, unless the offender forthwith upon conviction pay to the church-wardens of the parish where the offence is committed, or the party apprehended, to the use of the poor of the said parish the sum of 20*s.* for every hare, &c.—*Erskine*, on behalf of the defendant, proposed to take several objections; 1st. That the Stat. 1 Jac. 1. c. 27. was in this respect virtually repealed by the Stat. 22 and 23 Car. 2. c. 25. On a question being then put by the Court, Whether the conviction were not informal for want of an adjudication.—*Garrow*, who was to have argued in support of the conviction, admitted that this objection was decisive; on which—Lord *Kenyon*, Ch. J. said, Without agitating the question respecting the repeal of the Statute of James, which need not be discussed in this case, I am clearly of opinion that the conviction cannot be supported for want of an adjudication. Before the Case of R. v. Vipont (*a*) there had been determinations both ways; but in that case it was clearly settled that this was a fatal objection. I have rather a fuller manuscript of that case than is to be found in Burrow's Reports; and according to that, *Wilmot*, J. said "The other objection, for want of an adjudication, is still more material. A conviction is in the nature of a verdict and judgment, and therefore it must be precise and certain. And notwithstanding some old cases in Salkeld (*b*) and in other books to the contrary, I take it that the judgment is an essential point in every conviction, let the punishment be fixed or not. And so it was held in R. v. Hawkes (*c*) on a conviction for A. D. 1797.

(*a*) 2 Burr. 1163.
(*b*) Vid. R. v. Chandler, Salk. 378.
(*c*) Vid. 2 Str. 858.

A. D. 1797. deer-stealing, though the penalty there was fixed at 50*l.* certain; and in that case Mr. Fazakerly cited two cases to the same effect. This matter also came before the Court in Tr. 9 Geo. 1. on a conviction on the Stat. 1 Geo. 1. c. 48.; and there the conviction was only *ideo consideratum est quod convictus est*, &c. and though that point was not there decided, it appears to have been the sense of the Court that the conviction was bad for that reason. That case is reported in modern cases in law and equity (*a*): but it is totally mistaken there, as indeed are nine cases out of ten in that book." Therefore, without considering the other point concerning the virtual repeal of the Statute of James, which I desire to leave untouched, I am clearly of opinion that this conviction cannot be supported for want of an adjudication. —Per Curiam. Conviction quashed (*b*).

(*a*) Vid. R. v. Ashton, 8 Mod. 175.

(*b*) Another conviction against the same defendant was also quashed for the same objection. See also R. v. A. Hall, Cowp. 60; and R. v. Dimpsey, 2 T. R. 96.

A. D. 1797. *The King v. Bellamy. 3 Anstr. Rep. p.* 898.

On an appeal from a conviction for killing game, on 13 Geo. 3. c. 80. the Quarter Sessions may either order payment of the penalty, or imprisonment. A recognizance of a surety taken for trying the appeal, and paying the penalty with costs, on affirmance is bad. An order of

The defendant was convicted, under the 13 Geo. 3. c. 80. for killing game. He appealed, and entered into recognizance with two securities, conditioned to try the appeal, and, in case of affirmance, to pay the penalty or forfeiture of 20*l.* together with such costs as should be awarded. At the quarter sessions the conviction was affirmed, and the defendant ordered to pay the penalty and costs. This he was unable to pay, and was taken into custody, and detained two days, but brought up again before the end of the sessions, and discharged, the Court not considering themselves entitled to confine him.—*Rose* moved to discharge the recognizance of the securities (which had been estreated,) on two grounds; —the informality of the condition of it, and the satisfaction of the sentence by imprisonment. The 13 Geo.

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the justices to keep in confinement for two days, during their sessions, is not a commitment in execution for this offence, which must be for three months, if at all.

3. c. 80. s. 4. directs a recognizance, conditioned that the defendant "shall abide the order of, and pay such costs as are awarded by, the Justices." He argued, that the condition of this recognizance, to pay the said penalty, and the costs awarded, was a material variance, as the order of the Justices might not be the payment of the penalty, but imprisonment or distress. He also insisted, that as the Justices might imprison, the confinement must be understood to be in execution of that authority, and a satisfaction of the condition of the recognizance.—*Caldecott*, on the other side. To be a satisfaction of the conviction, the confinement must be in pursuance of the powers invested in the magistrates. But even if the Court of Quarter Sessions had the power of imprisoning at all, yet it can only be a power similar to that of the Justice from whom the appeal is made, *viz.* to commit for three months, without any discretion to shorten the time. Then a confinement for two days could not be in execution for this offence. But the Justices have no power to imprison at all. The original order of the Justice must always be merely for the payment of the penalty; and the only order the Justices at quarter sessions can make, is to affirm or quash that order. The reason of allowing the Justice originally to distrain on non-payment, and to imprison for want of distress, is to secure some punishment of the offender, if he cannot pay the penalty. But on the appeal, the payment of the penalty is secured by the security taken. Accordingly, no such power is given the Justices at quarter sessions to distrain or imprison for non-payment; and it cannot arise by implication. Then a recognizance to pay the penalty is the same thing in effect as a recognizance to abide the order, for that is the only order that can be made.—The Court thought, that the confinement could not be referred to the sentence as a satisfaction of it, not being in pursu-

A. D. 1797. ance of the power vested either in the Justice or the Quarter Sessions. But they held that, by the act, the alternative was given to the Justices either to direct payment, or, in case of non-payment, to confine the defendant for three months. The recognizance not pursuing the act, but confining the condition to one of the alternatives, is bad. The order was granted.

A. D. 1796. *Jones v. Perry.* 2 *Espinasse's Rep.* p. 482.

[In an action on the case for keeping a mischievous dog, by which the plaintiff's child was bitten, report of the dog having been before bitten by a mad dog is evidence to go to the Jury that the plaintiff knew the dog was mischievous and ought to be confined, on the count stating that fact, particularly if the defendant, by tying the dog up, shewed some knowledge or suspicion of the fact.]

This was an action on the case. The declaration contained three counts; the first, for keeping a dog, knowing him to be mad; the second, for keeping a fierce and savage dog without being properly secured; the third, for keeping a dog used to bite; with the usual scientur to all the counts—by which the plaintiff's child was bit and torn, and in consequence thereof died per quod servitium amisit. Plea of not guilty. It appeared in evidence, that the dog had been tied up in a cellar belonging to the defendant, but the rope or chain by which he was fastened was of such a length, that it suffered him to go to the curb-stone on the opposite side of the street: the dog broke through a little wicker gate into the street, and tore the plaintiff's child; it was carried to the salt water; but, after its return, was seized with the hydrophobia and died. A witness was asked if she had not heard in the neighbourhood, that Perry's (the defendant) dog had been bit by a mad dog.—*Mingay* objected to the question as not evidence.—Lord

Kenyon said that it might be asked; for if common report was, that the dog had been bit, a certain duty attached to the defendant to keep the dog properly secured. No evidence was given that the defendant knew that the dog had been bit by a mad dog, or that he was used to bite, or was even a vicious animal. The evidence on the contrary proved, that the dog, till a very short time before the accident, went in common about the streets, and was very good tempered and tractable. —*Mingay* for the defendant then insisted, that the scientur was the ground of the present action, which if not expressly proved, the action fell to the ground: that the evidence in the present case went expressly to negative it, as it did not appear by any evidence, that the defendant knew the dog to be mad, fierce, unruly, or used to bite.—Lord *Kenyon*. There are three counts in this declaration, and I have no doubt there is evidence to go to the Jury that the dog was a fierce and unruly dog, and not properly secured: but not that the defendant knew him to be mad or used to bite, and therefore this not a case for vindictive damages. Such a case as this I believe never appeared before; but I am clearly of opinion the action is maintainable. Report had said the dog had been bitten by a mad dog; it became the duty of the defendant to be very circumspect: whether the dog was mad or not, was matter of suspicion; but it is not sufficient to say, "I did use a certain precaution." He ought to use such as would put it out of the animal's power to do hurt: here too the defendant shewed a knowledge that the animal was fierce, unruly, and not safe to be permitted to go abroad, by the precaution he used to tie him up; that precaution has not been sufficient, and for want of it the injury complained of has happened. I am clearly of opinion the plaintiff is entitled to recover. The Jury found a verdict

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A. D. 1796. for the plaintiff, damages 30*l.*—*Erskine* and *Lawes* for the plaintiff. *Mingay* for the defendant.

The King v. Dunn. 8 *Term Rep. p.* 217.

The 5 Geo. 2. c. 19. s. 2. requiring the party removing a conviction by a magistrate into B. R. to enter into a recognizance with two sureties in 50*l.* conditioned to prosecute the writ with effect, &c. is not complied with by the party and his two sureties entering into a recognizance in 25*l.* each, but it must be in the entire sum of 50*l.*

Mr. Girdlestone, a magistrate of the county of Norfolk, had convicted the defendant for using engines to kill game under the 5 Ann. c. 14.; the second section of which provides that the proceedings shall not be removed by certiorari unless the party convicted shall before the allowance of such certiorari become bound to the prosecutor in 50*l.* with such sufficient sureties as the convicting magistrate shall think fit, with condition to pay to the prosecutor within fourteen days after such conviction or procedendo granted his full costs, &c. (*a*). The defendant intending to remove the conviction into this Court by certiorari, in order to make an application for an information against Mr. Girdlestone for malpractice in his office, obtained the writ last term returnable immediately; and entered into a recognizance with two sureties, each in 25*l.* before another magistrate, and delivered such recognizance with the certiorari to Mr. Girdlestone (*b*).—*Mingay* moved on a former day, upon production to the Court of the cer-

(*a*) The Court did not decide whether or not the party convicted should give a bond pursuant to this statute before the removal of the conviction by certiorari into this Court, no objection having been taken by Mr. Girdlestone's counsel on that ground; and in fact such a bond was given before the motion was finally disposed of. See the next note.

(*b*) This method was taken with a view to comply with the requisites of the 5 Geo. 2. c. 19. s. 2.; throughout the whole argument it was assumed that this statute applied to the present case; and the attention of the Court was never called to that point. But it may admit of doubt how far that assumption was warranted; for the title of the Act of 5 Geo. 2. is "to oblige justices of the peace, at their general or quarter sessions to determine appeals made to them according to the merits of the case, notwithstanding defects of form, &c. and to oblige persons suing forth writs of certiorari to remove orders made on such appeals into B. R. to give security to prosecute the same with effect." The 1st sect. reciting that "in many cases where justices of the peace are empowered to make judgments or orders great expenses have been occasioned by reason that such judgments or orders have on appeals to the quarter sessions been quashed on objections to form, &c." enacts, "that upon all appeals to be

tiorari and recognizance, but without any return made to the certiorari, that the writ be quashed quia improvide emanavit; inasmuch as there could be no regular allowance of it by the magistrate below unless the party convicted entered into a recognizance in 50*l.* as required by 5 Geo. 2. c. 19. s. 2. and as the statute was not complied with by a recognizance of three persons in 25*l.* each. And the Court (after hearing *Erskine* on the other side) were clearly of opinion that there ought to have been a single recognizance of the defendant and two sureties in 50*l.* and that the recognizance taken in 25*l.* each was not a sufficient compliance with the act of parliament.—*Erskine* then contended that the effect of this would not be to make the rule absolute for quashing the certiorari, because the writ itself had been properly sued out, as it must be, before the entering into the recognizance; but that the party convicted was still at liberty to tender a sufficient recognizance to the magistrate, who would be thereupon bound to allow the certiorari, and then the Court would have the conviction regularly returned before them.—*Mingay* resisted this; contending that the writ before sued out was functus officio, and no farther proceeding could be had upon it; and that no other writ could now be sued out as the time was expired, which is six months after the con- A. D. 1796.

made to the quarter sessions against judgments or orders made by any justices as aforesaid, such justices shall upon such appeals cause any defect of form in any such original judgments or orders to be amended without costs, &c. and proceed to examine into the merits, &c." Then the 2d section (on which this question turned) reciting that "writs of certiorari have been procured to remove such judgments or orders into B. R. in order to discourage and weary out the parties by delays and expences," enacts "that no certiorari shall be allowed to remove any such judgment or order, unless the party prosecuting such certiorari, before the allowance thereof, shall enter into a recognizance with sufficient sureties before a justice of the peace of the county or place, or before the justices at their quarter sessions where such judgment or order shall have been given, or before one of the judges of B. R. in the sum of 50*l.* with condition to prosecute the same at his own costs with effect, &c." Now the Statute of Ann, on which the conviction was founded, gives no appeal to the quarter sessions, but only requires the party removing the proceedings by certiorari into this Court to "become bound to the person prosecuting the same in the sum of 50l. with two sufficient sureties, &c."

A.D. 1796. viction by 13 Geo. 2. c. 18. s. 5.—Per Curiam. The writ of certiorari itself was properly issued, but we cannot proceed upon it till it has been regularly returned to us: and the party suing out the writ has no right to call upon the magistrate to allow and return it, until he has entered into a proper recognizance such as the statute requires. Here it appears that no such recognizance has been entered into, and therefore we cannot compel the magistrate to make a return to the writ. We cannot however quash the writ or take any further notice of it till it has been properly allowed and returned. Rule discharged. On a subsequent day in this term, (a recognizance pursuant to the Statute of the 5 Geo. 2. c. 19. s. 2. having been in the mean time entered into and returned with the conviction into this Court,) *Erskine* obtained a rule calling on Mr. Girdlestone to shew cause why an information should not be granted against him under the circumstances disclosed.

A. D. 1799. *The King v. Clarke.* 8 *Term Rep. p.* 220.

On a question of qualification of a defendant for killing game, the convicting magistrates may ground their opinion of his not being qualified on the fact of the defendant's having on a former day sworn under the income act to an estate under 100l. a year. The convicting magistrates

This was a conviction on the 5 Ann c. 14. s. 4. for keeping and using a greyhound for the destruction of game without being duly qualified. The record of conviction returned into this Court by certiorari, set forth the information, (which negatived the qualifications contained in the Stat. of the 22 and 23 Car. 2. c. 25.) the summons to appear, the defendant's appearance, and the plea of not guilty, the examination upon oath of the informer on the 29th September, 1798, in the presence and hearing of the defendant, wherein the informer deposed that on the 14th September, 1798, at, &c. the defendant "did keep and use a greyhound to kill and destroy the game, and that he (the informer) then and there saw the said defendant course and kill a hare with the said greyhound, &c.;" and further "that the defendant had not then any lands or tenements or any other

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ought to state in the conviction the whole of the evidence for and against the defendant.

estate of inheritance of the clear yearly value of 100*l.* &c." negativing specifically each of the qualifications enumerated in the Stat. of Car. 2. The conviction then proceeded as follows: "and it duly appears to us the said justices in the presence of the said defendant, that he on the 22d March, 1798, at, &c. before B. F. and B. C. (*a*) &c. commissioners appointed by 'an act for granting to his majesty an aid and contribution for the prosecution of the war,' then and there acting as such commissioners did make a declaration in writing, signed by him, that his annual income did not exceed 50*l.* and that the said defendant was then and there examined by the said commissioners, and then and there upon his oath deposed that the value of the whole lands, tenements and estate of the said defendant was then 70*l.* a year and no more; and it further duly appears to us the said justices in the presence of the defendant, on, &c. that the said commissioners on the said 22d March, 1798, agreeably to the directions of the act, &c. did rate the defendant, being then both owner and occupier of the whole of his lands, &c. at one and a half's rent of his said lands, &c. amounting to 105*l.* and that the defendant then and there stated upon oath before the said commissioners that 17*l.* a year interest money was then payable out of his said lands, &c. and did then and there claim to be allowed the same as interest paid for money charged upon his said lands, &c. and that the same was then and there allowed to the said defendant, &c. and was deducted from the said 105*l.* and that after such deduction he then was and still is assessed at 88*l.* and no more. And the defendant on, &c. before us the said justices, admits that he made the said declarations and claim of allowance, &c. and received such allowance, and that the value of his said lands, &c. has not increased since the time of making such de-

(*a*) The justices before whom the defendant was convicted.

A. D. 1799. clarations, &c. and that he has not since the said 22d of March, 1798, acquired other lands, &c. and that the said 17*l.* a year interest money is still payable out of his said lands, &c." The conviction then proceeded to state that the defendant, being called upon to make his defence, said that he was possessed of an estate in the parish of Whitgift of the yearly value of 100*l.* and upwards, and produced A. B. a witness, who said that "he knew the defendant's said estate, and he thought the same worth 100*l.* a year, and that he the witness would give 100*l.* a year and upwards for it; but admitted that he would not swear that the defendant's said estate was worth 100*l.* a year clear of reprizes;" and the defendant being here questioned by us the said justices whether he will produce any witness to prove that his said lands, tenements and estate are of the yearly value of 100*l.* clear of all reprizes, did not produce any such witness, &c. and did not require any further time, &c. Wherefore, &c.—*Chambre* objected to the conviction, because it did not appear that the facts on which the magistrates adjudged that the defendant was not duly qualified were properly in evidence before them; they having relied upon a prior transaction which happened before themselves when acting as commissioners for another purpose, but which ought to have been established on oath at the time of the conviction before the magistrates in the presence of the defendant, in order that he might have had an opportunity of controverting or explaining it. On the other hand it appears that the witness produced by the defendant at the time of the conviction swore to the defendant's being possessed of an estate of 100*l.* a year and upwards, and that he would give that rent for it; and (he observed that) it could not be expected that he should swear to its being worth that sum above reprizes, nor was it necessary. Besides, even admitting that

there was proper evidence before the magistrates of a deduction of 17*l.* a year out of the 105*l.* the value assessed by themselves on the former occasion, it does not appear but that this was on account of simple contract debts (*a*).—*Law*, *Heywood*, and *Danser*, contra, were stopped by the Court.—Per Curiam (*b*). It must be taken pro confesso that the defendant at the time mentioned in the conviction, when he was before the commissioners on the amount of his income, had not then an estate of 100*l.* a year in value. It is evidence out of his own mouth. And the witness adduced by him did not contradict this, even if he were credited to the full extent of what he deposed; for he would not undertake to say that the estate was of that value clear of reprizes. And as to the deductions being on account of simple contract debts, the contrary appears by the defendant's own shewing, for he claimed the allowance before the commissioners for the interest of money charged upon his estate. The Court at the same time testified their approbation of the manner in which the conviction was drawn up; in which the magistrates had not simply stated, in the terms of the act of parliament, that the defendant had kept and used the greyhound for the purpose of killing the game, but had set forth the particular evidence of his having so done, namely, that the witness had "seen him course and kill a hare with the said greyhound;" and had also set forth all the evidence for and against the defendant upon the question of his qualification. And they recommended this as a precedent to be followed in future; expressing themselves much dissatisfied with the general mode of

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(*a*) In Wetherill v. Hall, B. R. M. 23 Geo. 3. it was holden that an estate, the rents of which were reduced under 100*l.* a year by paying the interest of a mortgage, gave no qualification for killing game.

(*b*) Absent Lawrence, J. who was sitting in the Court of Chancery this day.

A. D. 1799. stating the evidence which had been practised in these cases *(a)*. Conviction confirmed.

(a) Vid. R. v. Hartley, Cald. 175. and Rex v. Thompson, 2 Term Rep. 18. where convictions stating the evidence generally where holden good. But in Lovet's case, 7 T. R. 152 though the strict legality of that mode of stating the evidence was admitted because there had been so many decisions, the Court reprobated the practice very strongly, and granted a rule nisi for an information against the convicting magistrate for not having stated all the evidence given on behalf of the defendant: but the rule was afterwards discharged, it appearing that he had acted by mistake.

The King v. John Swallow. 8 *Term Rep. p.* 284.

In a conviction if the defendant appear and plead and the evidence be given on the same day the Court will intend that the evidence was given in the defendant's presence even though it be stated that the appearance was at A. and that the evidence was given at B.—A defendant may be convicted of several offences in the same conviction.

This was a conviction against the defendant in the sum of 15*l.* for three penalties under the Game Laws. By the record of conviction it appeared that at Kelling, in the county of Norfolk, the informer came before *Z. Girdlestone*, one of the justices, &c. of Norfolk, &c. and swore that on three several days (mentioning them) at the parish of Waybourn in the said county, the defendant kept and used steel traps and engines to kill and destroy game, &c. That afterwards on a subsequent day, the 27th of October, the defendant, having been summoned, appeared before the justice to make his defence against the said charges, and having heard the same, was asked by the said justice if he could say any thing for himself, why he should not be convicted, &c.; that he pleaded not guilty; that on the said 27th day of October, at Holt, in the county aforesaid, one credible witness, J. C. on his oath swore, &c. "And thereupon the said defendant on the said 27th day of October, &c. at Holt aforesaid, before me the said justice, by the oath, &c. is convicted, and for his several offences aforesaid hath forfeited the sum of 5*l.* for each offence, making together the sum of 15*l.* to be distributed as the statute directs."—*Wilson*, for the defendant, took several objections to the conviction. First, it does not appear on the conviction at what place the defendant was summoned to appear, nor at what place he did appear: it

should appear to be at a place where the justice had jurisdiction. If it be considered that it was at Kelling, the place before mentioned, then, Secondly, it does not appear that the evidence was given in the presence of the defendant. And though in R. v. Thompson, Term Rep. 2 vol. 23. where the whole transaction before the magistrate appeared to have passed on the same day, the Court said they would presume that the evidence was given in the defendant's presence (*a*), it is observable that there only one place was mentioned in the conviction, so that such a presumption might reasonably be made. But here another place (Holt) is mentioned, where the witness was examined; and therefore the same presumption does not arise as in that case. On the contrary, the fair inference from the whole of what is stated in the conviction is that the defendant appeared at Kelling according to the summons, and that then an adjournment of the meeting to Holt took place, which excludes the presumption of the evidence having been there given in his presence. Thirdly, the defendant is charged with three offences, and the conviction is general, without saying of how many. Perhaps it may be doubted whether a defendant can be convicted in more than one penalty in the same conviction: but at all events the adjudication should distinctly shew the number of penalties in which he is convicted. A conviction for the said offence, when several are charged, is bad. R. v. Salomons, 1 Term Rep. 249; 2 Rol. Abr. 696. pl. 7. A general verdict, finding the point in issue by way of argument for the plaintiff or defendant, is never permitted, though the argument be necessary and concluding. Vaugh. 75. And though it is added in this case that "for his several offences aforesaid he hath forfeited 5*l.* for each offence, making A. D. 1799.

(*a*) See also Rex v. R. Aikin, 3 Bur. 1786.; R. v. Kempson, Cowp. 241.; and R. v. Lovet, 7 T. Rep. 153. and 6 Term R.

A. D. 1799. together 15*l.*" that is merely stated as a consequence of the informal conviction which precedes, and which cannot be cured by it. But the Court (stopping *Mingay*, who was to have argued in support of the conviction) overruled all the objections.—Lord *Kenyon*, Ch. J. said, as to the first objection, it will be understood that the summons to appear, and the appearance were at Kelling, the place before mentioned. Secondly, there would, I think, be great weight in this objection, if it had not been already overruled in former cases; and notwithstanding the introduction of another place (Holt) I think that this case must be governed by those. Thirdly, there is no objection to the conviction on the ground that the defendant has been convicted of several penalties. It is the constant practice in actions on the Game Laws, and not unfrequent in convictions. Even in indictments for capital offences several offences are sometimes charged, as burglary and stealing in a dwelling house to the value of 40*s*. I by no means wish that magistrates in drawing up convictions should set all forms at nought: but they ought not to be entangled in greater forms or ceremonies than the superior courts. The word "convicted" in this case applies to the several offences with which the defendant was charged, and to the evidence given in support of them; and the following words are, "and for his several offences aforesaid, &c." Taking the whole of the adjudication together, it is evident that the magistrate convicted the defendant in the three several offences charged. Conviction affirmed.

A. D. 1800. *Earl Ferrers v. Henton.* 8 *Term Rep. p.* 506.

An estate of the value of 150*l.* per annum, holden by the defendant in his own

This was an action (*a*) for the penalty on the Statute 5 Ann. c. 14. for killing game, not being duly qualified. At the trial at the last assizes at Leicester, the question turned on the defendant's qualification; as to which it

(*a*) The action is given by the 8 Geo. 1. c. 19. and 2 Geo. 3. c. 19.

appeared that he was possessed of certain premises of the yearly value of upwards of 150*l.* in his own right, under a lease granted to certain other persons named for ninety-nine years (*a*), if he, the defendant, and two others should so long live.—*Chambre*, B. being of opinion that this was a sufficient qualification for the defendant to kill game, nonsuited the plaintiff.—*Vaughan*, Serg. now moved to set aside the nonsuit, on the ground that the defendant's estate in the premises was not such as the statute requires for this purpose; being neither a lease for life, because the lives might survive the term; nor a lease for ninety-nine years certain, because the lives might drop before.—Lord *Kenyon*, C. J. Leases of this kind have always been deemed sufficient to give a qualification. There is no reasonable probability of any life in being extending beyond ninety-nine years: and the legislature in admitting leases for ninety-nine years of a certain value to be a qualification to kill game did not mean to require that they should positively enure so long: it is sufficient if they may extend to that period, subject as in this case to the contingency of the party's so long living.—Per Curiam. Rule refused.

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right, under a lease for 99 years to trustees, if the defendant and others should so long live, is a sufficient qualification to kill game under the Stat. 22 and 23 Car. 2. c. 25. s. 3.

(*a*) The 22 and 23 Car. 2. c. 25. s. 3. enacts that "every person, not having lands and tenements or some other estate of inheritance in his own or his wife's right of the clear yearly value of 100*l.* per annum, or for term of life, or having lease or leases of 99 years, or for any longer term of the clear yearly value of 150*l.* &c. is thereby declared to be a person by the laws of this realm not allowed to have, &c. any guns, &c. for the taking and killing of game."

Clark v. Taylor. 3 Espinasse's Rep. p. 218.

This was an action of debt on the Game Laws, to recover from the defendant the penalties for killing game, he not being qualified, and not having a licence. The declaration stated the offence of killing the game, to have been committed in the parish of Hippolitts, in the county of Hertford. The plaintiff having proved that the defendant had killed the game on his manor, the

In an action of debt on the Game Laws, the parish laid in the declaration is only for a venue; and the plaintiff may prove the

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defendant guilty at any other parish within the county.

counsel for the defendant were directing his cross-examination of the witness as to the place, suggesting that it was not in the parish of Hippolitts, as laid in the declaration, but in an adjoining parish. They were interrupted by Lord *Kenyon*, who said, it was of no importance. When part of the penalty was given to the poor of the parish, then there it was matter of substance, and the offence was necessarily laid in the proper parish; but as the penalty was not now so disposed of, the parish was only laid as a venue; and the plaintiff might prove the defendant guilty at any other parish within the county. The plaintiff had a verdict for one penalty.—*Garrow* and *Espinasse* for the plaintiff.—*Shepherd*, Serg. for the defendant.

Ross's Case. 2 East's Pleas of the Crown, p. 1067.

Ross's Case, Leicester, Sp. Ass. 1800. cor. Chambre B. MS. Jud.

The breaking down the head or mound of a fish pond with a view of letting the water out, in order more effectually to steal the fish, is not an offence within the Stat. 9 Geo. 1. c. 22 which makes the unlawfully and maliciously breaking down such head, &c whereby the fish shall be lost, or destroyed, a capital felony.

Thomas Ross was indicted on the Stat. 9 Geo. 1. c. 22. for unlawfully, maliciously, and feloniously breaking down the head and mound of two fish ponds, in a place called Bosworth Park, belonging to Sir Wolston Dixie, Bart. whereby the fish therein were lost and destroyed. It was proved that a part of the head or mound of one of the ponds had been cut down to a considerable depth by two persons, of whom the prisoner was one, so as to leave but little water in the pond, and that the fish were gone. But it appeared to have been the object of the offenders to steal the fish, and not to let them escape through the breach in the mound. For the weeds were much trodden down in the pond, manifestly in searching for the fish; and the two persons had been seen with sacks, which there was evidence sufficient to prove were filled with fish; and there was no evidence to shew that any of the fish had escaped through the cut, or that it was the occasion of their loss or destruction an otherwise than by rendering it more easy to take them when the greatest part of the water was let

off.—*Chambre, B.* at the first was inclined to think, that A. D. 1800.
though the prisoner might have been indicted for a misdemeanor under the Stat. 5 Geo. 3. c. 14. the case proved did not support the indictment for the felony, conceiving that the Stat. 9 Geo. 1. was meant to apply only to cases of malicious mischief, and when the breaking of the mound was the immediate cause of the loss and destruction of the fish, and not merely auxiliary to the destruction of them by other means: but not recollecting any case upon the construction of this clause, he left the evidence of the facts to the Jury, who found the prisoner guilty; and he respited judgment in order to take the opinion of the Judges upon the question of law. In Trin. Term 1800, the Judges on conference held the conviction wrong, as the clause against breaking the heads, &c. of ponds does not extend to cases where the object of the party was to steal the fish; which is guarded against by another clause. And that even if the offence proved had been originally within the Black Act, it was virtually taken out of it by the subsequent Statute of the 5 Geo. 3. c. 14. Perhaps the abovementioned Statute of the 5 Eliz. which was not adverted to upon that occasion, may also be thought to meet the case so far as concerns the act of cutting the dam with intent to steal the fish.

Vide East's Pleas, 611.

The King v. Edwards. 1 *East's Rep. p.* 278. A. D. 1801.

A conviction on the Stat. 5 Geo. 3. c.14. for fishing without consent of the owner "in part of a certain stream which runneth between B. in the parish of A. in the

The following conviction was removed into this Court by certiorari. Warwickshire. Be it remembered, that on the 27th of May, 40 Geo. 3. at Aston in the county of Warwick, Thomas Chattock, of, &c. came before me the Rev. B. S. one of the justices assigned to keep the peace in and for the said county of Warwick, &c. and upon oath, &c. gave me to understand, that on the 25th of May last past defendant did fish with a net in a certain river or stream called Tame, in that part of the

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said river or stream which runneth between Bromford Forge in the parish of Aston in the county of Warwick and Castle Bromwick in the said parish of Aston in the said county; of the fishery of which part of the said river or stream Lord Bradford and H. Legge, Esq. then and there were owners, with an intent and attempt then and there to take, kill, and destroy the fish in the said river or stream so situated as aforesaid, against the form of the statute, &c. and without the consent of the said Lord B. and H. L. or either of them, then and there owners of that part of the fishery of the said river or stream; he the defendant not then and there having any just right or claim to take, kill, or carry away any of the fish in that part of the said river or stream, or any just right to attempt to take, kill, or destroy any fish in that part of the said river or stream so situated as aforesaid, the said part of the said river or stream aforesaid wherein the said fish were so intended and attempted to be taken, killed, and carried away by the defendant not being then and there in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling house, but in other enclosed grounds then and there being private property; and that the said Lord B. and H. L. then and there were the true and lawful owners of that part of the said river and stream, and of the fishery thereof; and that the same is their private property; and that the defendant had not then and there their licence and consent, or the licence and consent of either of them. And whereas the said defendant after having been duly summoned in this behalf to appear before me the said justice this 30th of May instant, &c. at Aston aforesaid, in the county aforesaid, and appeareth and is present in order to make his defence against the said charge contained in the said information, and having heard the same read, is asked by me the justice if he can say any

county of W. and C. in the same parish and county," quashed, because it did not appear that the intermediate course of the stream between the two termini in which the offence was alleged to be committed was in the county of W. and within the jurisdiction of the convicting magistrate.

thing for himself why he the defendant should not be convicted of the offence charged upon him in form aforesaid, who pleadeth and saith he is not guilty of the said offence; nevertheless on the said 30th May instant, &c. at, &c. J. F. a credible witness cometh in his proper person before me the same justice, and upon his oath, &c. deposeth and saith, that on the 25th of May last past, in the year aforesaid, he saw the defendant with one W. S. drawing a draught net in the said river or stream called Tame, which runneth between Bromford Forge in the parish of Aston in the county of Warwick, and Castle Bromwick in the said parish of Aston, in the said county of Warwick aforesaid, to take, kill, or destroy the fish, or attempt to take, kill, or destroy the fish in the said part of the said river or stream; and that the said part of the river or stream is not in any park or paddock, garden, orchard or yard adjoining or belonging to any dwelling house, but in other enclosed grounds then and there being private property; and that Lord B. and H. L. are the true and lawful owners of the fishery of the said part of the said river or stream; and that the defendant had not then and there the licence and consent of the said Lord B. and H. L., or either of them, to take, kill, or destroy, or attempt to take, kill, or destroy the fish in the said part of the said river or stream; and that he the defendant had not then and there any just right or claim to take, kill, or carry away any of the fish in that part of the said river or stream so situated as aforesaid, or any just right or claim to attempt to take, kill, or destroy any of the fish in that part of the said river or stream so situated as aforesaid. It is therefore by me the said justice upon the evidence of the said J. F. adjudged, that the defendant is guilty of the said offence, and that he the said defendant be, and he is hereby convicted of the said offence, according to the form of the

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A. D. 1801. statute aforesaid; and I the justice do award and adjudge, that for the offence aforesaid he the defendant hath forfeited the sum of 5*l.* to be paid as the statute directs to me the said justice for the use of the said Lord B. and H. L. as owners of the fishery of the said river or stream so situated as aforesaid where the said offence was committed.—*Clarke* took several objections to the conviction. 1. It does not appear that the offence was committed in the county of Warwick. It is only stated that the defendant fished "in that part of the river or stream called Tame which runneth between Bromford Forge, in the parish of A. in the county of W. and Castle Bromwick in the said parish of A. in the said county." Non constat but that, though both the termini are in the county of W. yet that the part of the stream running between them in which the defendant fished may be in another county, out of the jurisdiction of the convicting magistrate. Such a circumstance is not unusual. 2. It is not stated that the complaint was made on behalf of the owners of the fishery or by their consent. In Rex v. Corden (*a*) a conviction for the same offence was quashed, because it neither appeared to have been made on the complaint of the owner, nor that the fact was done without his consent. Here indeed there is the allegation that it was done without the consent of the owners, but it does not appear to have been done against their consent; and as the view of the several Acts of the 22 and 23 Car. 2. c. 25. s. 7. the 4 & 5 W. & M. c. 23. s. 5. and the 5 Geo. 3. c. 14. s. 3. was to make compensation to the owner for the private injury by giving him the penalty, the information can only be laid before the justice by or on behalf of the owner of the fishery, which it is not so stated to be in this instance, and therefore there does not appear to be any jurisdiction in the convicting magistrate to take cognizance of such a complaint by a

(*a*) 4 Burr. 2279.

common informer. By the last mentioned act the owner has an option either to prosecute before a magistrate for the penalty, or to bring his action for it, which option will be taken away if a third person may elect for him against his consent to lay the information before a magistrate. 3. The evidence stated to prove that the fishing was without the consent of the owners ought not to have been received, since no third person could swear positively to that fact. 4. The defendant is charged with having fished in the river, "with an intent and attempt to take, kill, and destroy the fish," &c. and the justice adjudges him guilty of the offence aforesaid. Now the Stat. of Geo. 3. before mentioned, on which the conviction is founded, makes it an offence to take, kill, or destroy fish, or to attempt to do so. The information therefore in describing the offence ought to have pursued the words of the statute; but neither that nor any other of the statutes on this subject describe the offence as here stated, and it is left uncertain of what offence the defendant is convicted. Rex v. Mallinson (*a*), Rex v. Trelawny (*b*), and Rex v. Salomons (*c*).—*Balguy*, contra, after attempting to answer the first objection by saying, that the Court would presume that the river was in the same county as the two termini mentioned between which it flowed, and which were stated to be in the county of Warwick, was proceeding to answer the other objections; but the Court said, it was not necessary to enter into the subsequent objections, because the first was decisive. They could not presume that the place where the offence was committed was within the jurisdiction of the convicting magistrate: but it must expressly so appear. Now it did not follow that the intermediate course of the stream was in the same county with the two termini mentioned: the fact was often otherwise. Conviction quashed.

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(*a*) 1 Burr. 679.
(*b*) 1 Term Rep. 228.
(*c*) Ib. 249

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The King v. John Gilbert. 1 *East's Rep. p.* 583.

Indictment for engrossing a great quantity of fish, geese, and ducks, held bad, without specifying the quantity of each. See 1 East. 169. as to what engrossing is indictable.

An indictment charged that the defendant on, &c. at, &c. did engross and get into his hands by buying of and from divers persons unknown a great quantity of fish, geese, and ducks, to the intent to sell the same again; to the evil example, &c. and against the peace, &c.; and being removed by certiorari into this Court, the defendant demurred generally; and objected, amongst other matters, that no quantity was specified of the several articles charged to be engrossed.—*Wood*, (being called upon to support the indictment,) referred to Rex v. Tracy, 6 Mod. 32. where it was said by *Powell*, Justice, that an indictment for engrossing magnam quantitatem frumenti was holden good; and this is recognized in 1 Hawk. c. 80. s. 22.—Sed Per Curiam. There are many authorities (*a*) to shew that this form of indictment is bad: it includes several things, as fish, geese, and ducks, without ascertaining the quantity of each.—*Gurney*, in support of the demurrer. Judgment for the defendant.

(*a*) Cro. Car. 381. Anon. an indictment for engrossing magnam quantitatem straminis et feni was quashed, for not mentioning how many loads of each. So for selling diversas quantitates of beer. Rex v. Gibbs, 1 Stra. 497. and vide 2 Hawk. ch. 25. s. 74.

The King v. Stone. 1 *East's Rep. p.* 639.

3 B. & P. 307. 3 East. 192. 197, 8. 200. 1 T. R. 648. If a conviction before a justice of peace on the Game Laws state that the defendant was present at the time when the information was read and

The following conviction on the Game Laws was removed into this Court by certiorari. Bedfordshire, to wit. Be it remembered that on the 6th of January, in the 41 Geo. 3. at, &c. T. French, of &c. cometh before me, J. Webster, clerk, one of the justices, &c. and then and there giveth me the said justice to understand and be informed that T. Stone, of A. in the county of B. gentleman, within three months then last past, that is, on Saturday the 3d of January in the 41st year, &c. at M. &c. he the said T. S. being a person not then having lands or tenements or any

other estate of inheritance in his own right or his wife's right of the clear yearly value of 100*l.* per annum, &c. (and so negativing all the other qualifications of the Stat. 22 and 23 Car. 2.), nor then being in any other manner qualified or entitled in his own right to keep or use any engine to kill and destroy the game of this kingdom, did keep and use a certain engine to kill and destroy game, called a gun, against the form of the statute, &c.: of which said information, and of the offence therein charged upon him as aforesaid, he the said T. S. on the said 6th of January, &c. at M. &c. had notice. Whereupon the said T. S. appeareth, and is then and there on the said 6th of January, &c. at M. &c. present before me the said justice to answer and make his defence to the said information and the offence therein charged upon him as aforesaid; and he the said T. S. having heard the same is asked by me the said justice, If he can say any thing for himself, why he the said T. S. should not be convicted of the premises above charged upon him in form aforesaid? and the said Thomas Stone pleadeth that he is not guilty of the said offence. Nevertheless on the said 6th of January, &c. at M. &c. two credible witnesses, to wit, J. C. of, &c. and J. W. of, &c. come before me the said justice in their own proper persons, and before me the said justice, in the presence of the said T. S. they the said J. C. and J. W. being respectively then and there on the same day and year aforesaid at M. &c. duly sworn, &c. and depose, &c. (The conviction then set forth the evidence of the witnesses as to the fact of the defendant's having killed a pheasant on Saturday the 3d of January, 1801, in the parish of M. &c. but not stating any evidence of the disqualification of the defendant.) And thereupon the said T. S. being asked by me the said justice if he had any thing to say, or can produce any evidence in answer to

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the witnesses examined; and that when called on for his defence he produced no evidence, and did not require any further time; that is sufficient, without stating that he was previously summoned to answer, &c.

Qu. Whether it be necessary for the prosecutor to negative by evidence as well as in the information the qualifications of the defendant to kill game? and Qu. Whether the negative of such qualifications must be repeated in the adjudicatory part of the conviction, or whether it be not sufficient to convict the defendant of the offence aforesaid, referring to the previous part of the conviction which sets forth the information in which such qualifications were specifically negatived.

A. D. 1801. the several matters deposed to by the said J. C. and J. W. as aforesaid, he the said T. S. pretends and represents to me the said justice that he the said T. S. on the said 3d of January, &c. was qualified both in his own right and in right of his wife to kill game, but doth not produce any evidence thereof; nor that he the said T. S. on the said 3d of January, &c. had any lands or tenements or any other estate of inheritance in his own right or his wife's right of the clear yearly value of 100*l.* per ann. or for term of life, or any lease or leases for 99 years, or for any longer term, of the clear yearly value of 150*l.* nor that he the said T. S. was the son and heir apparent of an esquire, or of other person of higher degree; nor that he was the owner or keeper of any forest, park, chase, or warren, or gamekeeper to any lord or lady of or for any manor or manors; nor in any other manner qualified in his own right to keep or use any engine to kill and destroy the game of this kingdom; nor doth he produce any sufficient evidence thereof in answer to the several matters deposed to by the said J. C. and J. W. as aforesaid; nor doth the said T. S. require any further time for that purpose. And thereupon it manifestly appears to me the said justice that the said T. S. is guilty of the offence above charged upon him in and by the said information. Wherefore I the said justice on the said 6th of January, &c. at M. &c. on the oaths of two credible witnesses so taken before me as aforesaid, do adjudge him the said T. S. to be guilty of the offence aforesaid: and do thereupon convict him of the same; and do declare and adjudge that he the said T. S. hath forfeited the sum of five pounds for the same offence, to be distributed as the statute in that case made and provided doth direct.—*M'Intosh*, on the part of the defendant, objected, 1st, That the conviction does not state that he was duly summoned: and that this was not cured by

alleging that the defendant was present; for if a man be not apprized beforehand when he shall be called upon to answer a charge, he cannot be prepared for his defence or have his witnesses ready. In Rex v. Heber (*a*), an information was granted against a magistrate for convicting one without summoning him, he happening to be present when another person was convicted for the same offence, who had been previously summoned. It was there said to be a most known rule of common justice that no man should be convicted of an offence till he had previous notice given him of the charge. To be sure, in Rex v. Johnson (*b*) it was holden, that appearance cured all defects in the summons; but there the objection went only to the shortness of the summons, it having been issued on the same day on which the defendant was required to appear. In Rex v. Venables (*c*) it was ruled that a summons was necessary; but there no appearance was stated. (The Court expressing their opinion, that the appearance of the party, especially as he did not ask for further time, dispensed with the summons, this objection was abandoned.) 2dly, Neither the evidence nor the adjudication negatives the qualifications required by the Stat. 22 & 23 Car. 2.; the want of which is of the very essence of the offence. This was holden to be necessary in Rex v. Jarvis (*d*). It is true, that the qualifications are here negatived in the information; but that alone is not sufficient; for as the information is the ground of the summons, so the evidence is the ground of the adjudication, and the latter cannot go further than the evidence warrants. A. D. 1801.

(*a*) 2 Barnard, 34. 77. 101. (when this book was cited Lord Kenyon observed, that Barnardiston was a bad reporter; and that probably, if the conviction itself were looked into, it would appear either that the party was not called upon for his defence, or had not proper time given to him upon request.) Vid. 2 Stra. 914. S.C.
(*b*) 1 Stra. 261.
(*c*) Ib. 630. and 2 Ld. Ray. 1405.
(*d*) 1 Burr. 148.

A. D. 1801. And though it was said in Rex v. Crowther (*a*), that it had been no where directly decided that the evidence should negative every particular qualification; yet that was not the point in judgment; and at least that imports that there must be some general evidence of disqualification to put the party accused on his defence. But here there is not even general evidence. In Rex v. Wheatman (*b*), where the qualifications were negatived by the evidence, but not in the information.—*Ashhurst*, Justice, said, that the evidence must prove, but could not supply any defect in the information. And in the precedent in *Burn*, (*c*), the evidence negatives every particular qualification. And that form was agreed to be sustained in Rex v. Thompson (*d*), and R. v. Hartley (*e*), there cited; though the Court in other respects did not approve of it.—Lord *Kenyon*, C. J. referred to a MS. note of the King v. Jarvis (*f*), which was taken by the late Lord Ashburton, when at the bar, and corroborated the report

(*a*) 1 Term Rep. 125. 7.
(*b*) Doug. 345.
(*c*) 2 Burn's Justice, tit. Game.
(*d*) 2 Term Rep. 18.
(*e*) E. 22 Geo. 3. Cald. 175.
(*f*) Rex v. Morice Jarvis, Hil. Term, 30 Geo. 2.—This was a conviction against the defendant upon the Game Laws. The conviction sets forth, that on 12th October, 1754, at Hillerton, in the county of Wilts, A. B. came before the justices convicting, and made information, that the defendant, within 3 months, at the parish of H. in the said county, had and used a setting-dog and setting-net, he not being then qualified by the laws of this realm to keep and use, &c. to kill game. The conviction further sets forth that Webbe, a credible witness, came to the place aforesaid and made oath, that, &c. (in the words of the information). It then states, that defendant having been summoned and appearing before the justices at Devizes in the said county, and the evidence being read to him; and he being asked what he had to say for himself, and saying nothing except denying the fact; therefore the justices adjudged that the defendant was not anywise qualified, empowered, licensed, or authorized to kill and destroy game, or to keep and use dogs and nets to kill and destroy the game, and adjudge him guilty of the offence, and to forfeit the sum of 5*l*.—This conviction being brought up by certiorari and put in the paper, and coming on now to be argued.—Mr. *Gould* against the conviction, objected, 1st, The justices have not shewn that they have a jurisdiction; because they have not stated precisely that Jarvis had no qualification. The witness swears generally that the defendant was not qualified to kill game: that is not sufficient; but every qualification mentioned in the Stat. 22 & 23 Car. 2. ought to be set

by Sir James Burrow; in which, he observed, that A. D. 1801.
the Court had given an express opinion on the very

forth; and the defendant should be adjudged to have none of them: indeed other subsequent qualifications (as being lord of a manor, &c. which is an implied qualification by a later statute) need not be set forth. Rex v. Hill, 1 Lord Ray, 1415. In Bluet q. t. v. Needs, Comyns. 525. a general averment of the defendant's disqualification was considered as not sufficient in a conviction, though well enough in an action. Rex v. Pickells, Mich. 19 Geo. 2. The conviction there was for keeping and using a lurcher. It was objected that there was no averment that the defendant was not lord of a manor.—Lee, C. J. said, "he found no instance of that species of qualification being set forth; that all the qualifications mentioned in the Statute of Car. 2. must be set forth; but this is not in the precedents, because it is only an implied or argumentative qualification; the others are expressed." 1 Stra. 497. The first objection there is the strong one, upon which I believe that conviction was quashed. This is not a point of form only, but is of substance, and is necessary to give the justices jurisdiction; and therefore must be set forth. 2d, The witness was examined, in the first place, in the absence of the defendant, which was an irregular proceeding. The defendant should first have been summoned, and have had an opportunity to appear; because such examination is ex parte; and when a witness has once sworn a thing he is in a manner bound to abide by it though false, so that the defendant cannot cross examine him upon fair terms. And here too, it is to be observed, that at the second meeting, when the defendant was convicted, the witness was not sworn again, but his former deposition read; so that there was no opportunity for cross-examination on any terms. 3d. It is said that the defendant was not then qualified, three times are mentioned before in the conviction; 1st, the time of the offence committed; 2d, the time of the information given; 3d, that of the conviction. To which does *then* refer?—Mr. *Norton*, contra. If the Court see that there is an information made, an offence proved, and that the defendant has been heard, or had an opportunity of being heard, they will not be astute in finding flaws. To the 2d objection it has been said the justice should have summoned the defendant before he examined the witness. But I apprehend it would have been a stronger objection had he summoned the party to appear without any probable cause. If the defendant had desired an opportunity of cross-examining the witness, he had a right to it; but it does not appear he desired it, though the witness then attended. The only defence that the defendant made was that he did not commit the fact; he does not claim the qualification. To the first and great objection, the justices have adjudged the defendant expressly to be in no-wise qualified, empowered, licenced, or authorized; than which words nothing can be well stronger. In Rex v. Chandler, 1 Ld. Raym. 581. *Holt*, C. J. said, "it is sufficient for the justices to pursue the words of the statute." It was incumbent on Jarvis, if he had a qualification, to prove it; the justices were only to expect a charge of the fact committed from the witness examined. For it is almost impossible for a witness to prove that the defendant has not some of the qualifications. As for instance, he must be a herald and well skilled in the laws of precedency to know who at this time is an esquire, or a person of higher degree. To know who is qualified by virtue of this estate a witness must be intimately acquainted with a person's rental. A search must be made with the clerk of the peace before a witness could know who was a game-keeper. And, lastly, how can a witness inform himself whether the party he accuses be keeper of a chace, &c.? All these are negatives; the defendant is summoned to prove the affirmative if he can. There are several cases, though not expressly in point, yet applicable by parity of reasoning. In Rex v. Ford, 1 Stra. 555. which was a conviction for keeping

A. D. 1801. point in favour of the objection now urged. His Lordship read the note here subjoined.—*Gibbs*, contra. The

an alehouse without licence, it was objected that there was an exception in the act, and, that it should appear he did not fall within it; but the Court held that that exception coming by way of proviso, the defendant should have insisted on it in his own defence. Rex v. Theed, 1 Stra. 608. is in point; for there the exception did not come in by way of proviso, but in the enacting part. But further, it is sufficient if a conviction follow the very words of the statute. The Statute of Queen Anne, on which this conviction is grounded, has the words "not being qualified according to the laws in being" (or to that purpose); now here are these and stronger words added. In Q. v. Matthews, 10 Mod. 2. 2 Vin. Abr. and Burn's Justice, the Court said, it had been enough if the want of qualifications had been alledged generally; but it was holden bad, because some, but not all, were set forth. In Rex v. Marriott, 1 Stra. 66. the conviction was holden bad, because the words were the words of the witness; but had they been the words of adjudication of the justices it seems it would have been well. As to the Case of Rex v. Hill, it is certainly an authority against me as far as it goes; but it is stated so shortly that one can form little judgment from it. The words in that case possibly were the words of the witness, or there might be some other objection not stated. The case in Comyns, 525. as far as it goes, is with me, for in an action of debt for the penalty on this act, it is clearly enough to allege the want of qualifications generally. How those two cases are distinguishable I protest I do not see: the reason is the same; the defence is the same in both cases. In Rex v. Pickells the conviction was affirmed, though the objection taken was stronger than here. One qualification was omitted, though the others were set forth particularly; and I do not see why that qualification being created by another later law should alter the case. Therefore the point determined in that resolution seems not against us. He was then proceeding to answer the other objection; but the Court told him it would be determined on this; and also told Mr. *Gould* he need not take the trouble of replying.—Lord *Mansfield*, C. J. If this matter was res integra, and open to be gone into by reasoning at large, yet I should think it necessary for the justices to shew that the person convicted was an object of their jurisdiction; that is, that he had none of the qualifications mentioned in the Statute of Car. 2. For it is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them. But in this case I do not think myself at liberty to go into the question if it were doubtful; for all the cases from the making of the statute are uniform in support of the objection. The judgment in the Queen v. Matthews has nothing to do with this case: there is an obiter saying only at best. In Rex v. Marriott, the witness swore generally that the person was not qualified; that was holden bad. The witness in this case swears exactly the same; and the justices adjudge on that evidence only. The stream can never go higher than the spring head. Rex v. Hill is in point. In the case from Comyns, as that was an action, the general averment might be sufficient, because in the examination of the question at the trial the qualification might be gone into. The Chief Justice, in Rex v. Pickells, argued from this as a settled point, exceptio probat regulam. Therefore this point seems settled by all the determinations; for which reason I do not enter at large into the question, though if I should do that the exception seems well founded.—*Denison*, J. I thought this question had been at rest; because it is founded on strong reasons and rules of law. There is a known distinction between exceptions in a statute by way of proviso (which need not be set forth) and those in the purview of the act; and to this point there is a very

information in Rex v. Jarvis omitted to negative the defendant's qualifications, and was therefore clearly bad; and what was there said by the Court must be taken with reference to the point in judgment. There can be no difference in the rules of evidence as applicable to proceedings before justices of peace, and before the superior courts; and in actions for penalties it never was deemed necessary for the plaintiff to disprove the defendant's qualifications. It is impossible in the nature of the thing that a prosecutor should be able to prove all those negatives. If the fact constituting the offence be proved, it is sufficient to put the party upon his defence: and he to whom the fact must be best known must prove the affirmative, and shew that he was qualified to do it. It is true, that in R. v. Thompson (*a*) the precedent in Burn was sustained; but the Court expressed great dissatisfaction with it, and this point was not in question. It must indeed be stated in a declaration for the penalty, that the defendant "not being a A. D. 1801.

strong case (Rex v. Bell, vide Fost. 430.) upon an indictment against a person for having coining-instruments in his custody. It was said by Mr. *Norton*, that in a conviction it is sufficient to pursue the words of the act of parliament: but I think that is not so; and there are many cases where it has been ruled otherwise. Among other instances it was so determined in the Case of Rex v. Chapman, Easter Term, 28 Geo. 2. upon a conviction of a person for robbing an orchard; which the Court held not sufficient; but it ought to have appeared of what, and how, the orchard was robbed, that they might judge whether it were a robbery within the meaning of the 43 Eliz. c. 7.—*Foster*, J. I am of the same opinion. Where negatives are descriptive of the offence, there they must be set forth. The case my brother Dennison refers to upon the Stat. 8 & 9 W. 3. for having coining-instruments in his custody is very strong. I am strongly inclined against the authority of the case in Comyns upon the action of debt for the penalty. Conviction quashed.

(*a*) On the mention of this case Lord *Kenyon*, C. J. said, One point in that case has always afforded me great dissatisfaction; namely, that the Court would in any case intend that the evidence was given in the defendant's presence, without its so appearing on the face of the conviction. Mr. Justice *Buller*, unadvisedly as I think, in that case held that the form of conviction there pursued was well enough, because the precedent in Burn was in the same form. I am very sorry that that was ever acquiesced in by me (1). I have often thought since that there is sound sense in what was once said by the late Lord C. J. *Eyre*, that the sooner a bad precedent was gotten rid of the better.

(1) Vide R. v. Lovett, 7 Term Rep. 153. and R. v. Swallow, 8 Term Rep. 284.

A. D. 1801. person duly qualified, &c. to kill game," &c. did the act; but it is not necessary for the plaintiff to prove the disqualification; and if not, neither can it be necessary for the prosecutor to prove the like allegation in an information before a magistrate. If the negative of the qualifications were not introduced in the same clause of the act by which the offence is constituted, it would not be necessary even to state those negatives in the information: but that is a mere technical rule of pleading; and it cannot alter the nature of the evidence whether such matter be introduced in the same or any subsequent clause; it is still only matter of defence, and the affirmative must be proved by the party who wishes to avail himself of it. As to the other objection, the magistrate does not adjudge the defendant not to be qualified; for the information charges that he was not qualified in the manner required; and that being read to him, he denies it, and pleads not guilty to the whole; then the fact being proved, and he pretending to be qualified, but giving no evidence of it, as it was incumbent on him to do, the justice adjudges him guilty of the offence aforesaid; which therefore refers to the offence as charged in the information.—Lord *Kenyon*, C. J. The first objection is fairly gotten rid of. Justice requires that a party should be duly summoned and fully heard before he is condemned; but if he be stated to be present at the time of the proceeding, and to have heard all the witnesses, and not to have asked for any further time to bring forward his defence, if he had any, this at all times has been deemed sufficient. On the other point there is much weight in the objection. The Case of the King v. Jarvis was decided above forty years ago: and at that time Mr. Justice *Dennison* thought that the question had been long at rest; and Lord *Mansfield* said, that it had been settled by such a train of authorities that he did not think himself at

liberty to go into the question: and he referred to the Case of the King v. Marriott, where the witness only swearing generally to the want of qualification of the defendant was holden not to be sufficient. No comparison can be made between summary proceedings on a conviction before magistrates, and actions in the courts of common law. In the former it is incumbent upon the magistrates to shew expressly that they had a jurisdiction in the particular instance; and they have no jurisdiction to convict unless the defendant had none of the qualifications mentioned in the Statute 22 & 23 Car. 2. All these being in the purview of the act must be specifically negatived by the prosecutor in his information. The distinction between this case and one where the exceptions are introduced by way of proviso in a statute, was expressly stated by Mr. Justice Dennison, than whom no person was ever better versed in the rules of special pleading. And in Sir James Burrow's report of the case (*a*), it is stated to have been said by him, "that the evidence of the adjudication ought both of them to be, that the defendant has not those qualifications that are specified in the act, or any of them." That that was so stated and understood by the bar at the time appears from the precedent of the form of such a conviction settled by Mr. Dunning, which is given by Mr. Boscawen in his Treatise on Convictions (*b*), in which precedent the qualifications are all specifically negatived, not only in the information, but also in setting forth the evidence, and again in the adjudication. But it is said to be impossible for the prosecutor's witness to give negative evidence of the want of qualification in the defendant: but I do not see why that may not be done. A witness may give general evidence of it from his belief. He may know the defendant, and know that to all appearance he is not a man of substance: evidence may

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(*a*) 1 Burr. 154. (*b*) P. 156. vide p. 44-6 in the same book.

A. D. 1801. be given of his condition in life to raise a reasonable presumption against his having any of the necessary qualifications. It is necessary for courts of justice to hold a strict hand over summary proceedings before magistrates, and I never will agree to relax any of the rules by which they have been bound. Their jurisdiction is of a limited nature, and they must shew that the party was brought within it. Shall it be sufficient for the witness to say, that he saw such a person (perhaps a nobleman of the highest rank and largest fortune in the kingdom) out a shooting on such a day; and shall that be sufficient to convict him, because the information, which is not upon oath, contains in point of form an allegation that the defendant was not qualified. If this were sufficient to warrant a conviction, unless the defendant proved his own qualification, it may be necessary for him to bring his title deeds and witnesses from the furthest part of the kingdom, in order to shew his qualification. The proposition is monstrous; and the inconvenience and vexation would be insufferable. I know not how far it may not extend. The legislature only intended to subject persons not having certain qualifications to this summary jurisdiction. The defendant must therefore be shewn to be such a person. And if Lord *Mansfield*, Mr. Justice *Denmison*, and Mr. Justice *Foster* thought that all this was necessary above forty years ago, surely the length of time which has since elapsed, without their decision having been called in question, has not weakened but rather confirmed the authority of it. Therefore I am of opinion in this case that evidence ought to have been given of the defendant's want of the qualifications mentioned in the statute, which the magistrate should have set out in the conviction, and that he should have proceeded to adjudge that the defendant had not those qualifications.—*Grose*, J. I shall not attempt to vindicate all the doctrine which is to be

found in the books respecting summary proceedings before justices of peace. There are certain technical rules laid down for their observance, which I cannot reconcile to the rules which regulate proceedings in other cases. I cannot say why there should be any distinction between the mode of proof in a proceeding of this sort, and in an action on the Game Laws, where I believe no negative proof is ever given by the prosecutor of the want of qualification in the defendant; but the affirmative proof lies upon him to shew qualification. On looking however into the books, one finds that distinctions have been made between them, and that certain technical rules have been established for regulating proceedings on convictions which cannot now be overthrown without manifest confusion. Amongst other rules it has been said by Lord *Mansfield* and Mr. Justice *Dennison*, that there must be evidence of the defendant's want of qualification in order to warrant a conviction: and there is no such evidence stated in this conviction. Whatever therefore my opinion might have been if this had been res nova, I cannot set up my judgment against theirs which has been so long acquiesced in, and therefore I feel myself compelled to say that this conviction is bad.—*Lawrence*, J. Every conviction must undoubtedly charge, that the defendant had none of those qualifications which are mentioned in the enacting clause of the statute; for unless that be so charged, there is no offence imputed to the defendant of which he can be convicted. Then the fact committed by the defendant which brings him within the offence charged must be proved and set forth, and the magistrate must proceed to convict him of the offence imputed to him. But if there be a complete charge of the offence in the information, I do not see that, if the adjudication convict the party of the offence as charged against him in the information, it is necessary to repeat

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A. D. 1801. that charge in the adjudicating part of the conviction: the repetition of it does not make it stronger or more clear. Then as to the mode of proof by which the charge is to be sustained, I see no reason why the proof of the fact committed by the defendant should not prima facie be sufficient, at least so far as to throw the onus upon him of proving that he was qualified to do it. The difficulty of proving the negative of all the qualifications stated is so great as to make it impossible in some cases for a prosecutor to do it. It may perhaps sometimes be shewn that the defendant is in some inferior situation in life, such as a servant or the like, and so it may be presumed that he is not likely to be qualified: but the qualifications themselves are very numerous; and where the party is not known, or his circumstances not apparent, it must be almost impossible for a prosecutor to give even that sort of evidence, much less to disprove every qualification mentioned. A party may have small estates in several counties unknown to the prosecutor, all which together may amount to a qualification, though each were much below it. At any rate, there seems to be little or no advantage to a defendant in calling upon a witness to give general negative evidence of want of qualification, even in cases where it is capable of being done from a previous knowledge of the party. And if the main fact be proved, that he killed the game, &c. and he does not then prove that he was qualified to do so, nor desires further time to bring forward such proof, it appears to me that the justice is authorized to conclude that he is not qualified, and to convict him of the offence charged in the information. Here the information charges an offence within the jurisdiction of the convicting magistrate; the witness proves the fact committed by the defendant, which subjects him to the penalty of the statute; and the adjudication referring to the offence charged in the

information convicts him of such offence. But in Rex v. Jarvis the defect was in the information itself, which did not negative the qualifications. To that therefore must be principally referred what was said by the Court; which appears to have been grounded on the Case of the King v. Marriott, where the witness swore to the want of qualification, without its being charged in the information. Indeed in Rex v. Crowther, it seems as if it was required of the witness to give general negative evidence of the defendant's want of qualification, though it was holden not to be necessary to negative every particular qualification. But in that case it was not necessary to determine upon the necessity of it. And I cannot see what advantage it is to the defendant if it were given. Therefore upon the general rule which governs evidence of this sort, I think the affirmative proof lay on the defendant, and that the conviction is right.—*Le Blanc*, J. The conviction states the information laid before the magistrate, which negatives every particular qualification in the defendant. Then it states, that the party had notice of the charge, and was present when the witness was examined; that he pleaded not guilty, and the witness proved the fact against him; and then being called upon to make his defence, he pretended that he was qualified, but produced no evidence of it; whereupon the justice adjudges him guilty of the offence aforesaid. The first objection made is, that there was no summons, but that has been properly given up; for when it is stated that the party was present and heard the charge and the evidence against him, and made no defence, nor required any further time to prepare his evidence, it seems to be fully sufficient to warrant a conviction. Secondly, it is objected, that the evidence does not negative the defendant's qualifications; and thirdly, that they are not negatived by the adjudication. As to this last, when

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A. D. 1801. the information charges that he had none of the particular qualifications required by the statute, which it specifically sets out, and the justice adjudges him guilty of the offence aforesaid; that must necessarily mean the offence as it appears to be charged in the information, and is the same as if the adjudication had repeated in the negative all the qualifications there stated. As to the second objection, that the evidence does not negative those qualifications. In general the rule is considered to be, that a party is not required to prove a negative, but it lies on the other side to prove the affirmative of that which he insists on. Where the party has notice by the information of the offence with which he is charged, and which states that he had not such and such qualifications, that gives him notice to come prepared with proof that he has any such qualification. So far he is benefitted by the form of the information. But as to the proof, I do not know that there are different rules of evidence in case of proceedings before magistrates from those which apply to actions in the courts above. And if the Court were to determine that it was necessary for the witness to negative the defendant's qualifications, in order to warrant a conviction by a magistrate in this mode of proceeding, I do not see why it must not be equally necessary to give the same evidence before a judge and jury in an action for the penalty. Whatever is an authority for the one must I think equally bind the other. In Rex v. Jarvis the information itself did not negative the qualifications; that therefore was a fundamental objection. It was there neither charged, proved, nor adjudged that he had not any of the particular qualifications mentioned in the statute. The observation therefore made on that case by the Court applied to the information and to the whole of the proceedings, because in no part of the conviction were the particular qualifications ne-

gatived: it was not necessary therefore to discriminate between the information and the evidence. Therefore as the information in this case contains a proper and full charge of the offence, and it appears to me to be impossible that the prosecutor should be able to prove negatively that the defendant has not any of the qualifications mentioned, I think the conviction right. The Court, being equally divided, made no order. A. D. 1801.

Thos. Heath's Case. 2 East's Pleas of the Crown, p. 609. A. D. 1801.

Thos. Heath's case, Sarum, March 1801, and afterwards before all the Judges. MS. Jud.

Consonant to the above construction no indictment lies for deer-stealing in the first instance, although it be laid that the deer was reclaimed. And though the statute only mention red or fallow deer, yet the cross breeds, such as what is called a bastard menald, bred from a menald buck and a fallow doe, are within the act.

Bagott v. Orr. Bos. and Pul. Rep. p. 472.

Prima facie, every subject has a right to take fish found upon the sea-shore between high and low water mark; but such general right may be abridged by the existence of an exclusive right in some individual. Quære, If there be a prima facie right in the subject to take fish-shells found on the sea-shore between high and low water mark?

Trespass. The first count was for breaking and entering the plaintiff's closes, called the Foot-Muscle-Skear, the Great-Out-Muscle-Skear, and the Sea-shore, in the parish of Keysham, and plaintiff's shell-fish and shells there finding, catching, taking, and carrying away and converting and disposing thereof to the defendant's own use. The 2d count was for breaking and entering the same closes, and with defendant's feet and the feet of his servants in walking, treading up, trampling upon, subverting and spoiling plaintiff's soil, earth, and sand, and with the feet of cattle, and with the wheels of carriages, and the keels of boats treading up, and trampling, &c. and plaintiff's shell-fish and shells, breaking, crushing, and destroying, and with spades, shovels, mattocks, pickaxes and other instruments, digging and making holes and pits, and turning up, &c. plaintiff's earth, soil, and sand, and digging up, raising up, and getting up divers large

A. D. 1801. quantities of plaintiff's shell-fish and shells, and carrying away the same, and converting and disposing thereof to the defendant's own use. There were several other counts for breaking and entering plaintiff's several fishery and his free fishery, on which issues in fact were joined. The defendant pleaded, 1st, the general issue. 2dly, As to the trespasses mentioned in the two first counts, that the closes therein severally mentioned were the same, "and that the said closes, in which, &c. at the said several times when, &c. were and still are, and from time immemorial have been part and parcel of a certain arm of the sea, in which every subject of this realm at the said several times when, &c. of right had, and of right ought to have had, and now hath, and of right ought to have the liberty and privilege of fishing and catching, digging for, raising, getting, taking and carrying away shell-fish and shells there, therefore defendant being a subject of this realm at the said several times when, &c. entered into the said closes in which, &c. so being part and parcel of the said arm of the sea, to fish therein, and to catch, dig for, raise, get, take, and carry away the shell-fish and shells there, and did then and there fish, and caught, took, and carried away the said shell-fish and shells in the first count mentioned, and also dug up, raised up, and got up, took and carried away the said other shell-fish and shells in the second count lastly mentioned, as it was lawful for him to do, and for the digging up and carrying away of the said shell-fish, he entered the said closes in which, &c. by himself and with other persons, and with the said cattle, carts, waggons, and other carriages, and the said boats, lighters, and other vessels, the same being reasonable, proper, and necessary in that behalf, and in so doing he necessarily and unavoidably with his feet and the feet of those other persons in walking a little

trod up, trampled upon, subverted, and spoiled the soil, earth, and sand in the second count mentioned, and with the feet of the said cattle, and with the wheels of the said carts, waggons, and other carriages, and with the keels of the said boats, lighters, and other vessels a little trod up, trampled upon, tore up, and subverted and spoiled other the soil of plaintiff's last-mentioned closes, and the said shell-fish and shells in the second count first mentioned necessarily and unavoidably a little broke, crushed, and destroyed, and with the said spades, shovels, mattocks, pickaxes, and other instruments, the same being useful, proper, and necessary in that behalf, and in digging up, raising, and getting the said shell-fish and shells in the second count lastly mentioned, necessarily and unavoidably dug and made the said holes and pits in plaintiff's said closes, and necessarily and unavoidably with the spades, shovels, mattocks pickaxes, and other instruments, dug up, turned up, subverted, and spoiled a little of the earth, soil, and sand in the said closes, doing as little damage on that occasion as he could, which are the same, &c. whereof, &c. And this, &c. wherefore, &c. Upon this the plaintiff new assigned, alledging that defendant, on the days in the first count mentioned, broke and entered the plaintiff's close in the first count mentioned, "being certain closes lying within the flux and reflux of the tides of the sea in plaintiff's manor of Keysham, and the said shell-fish and shells there then found, caught, took, and carried away and converted and disposed thereof to his own use, when the same closes, in which, &c. were left dry, and were not covered with water." And also that defendant on the days and in the manner in the second count mentioned, broke and entered plaintiff's closes, "being certain closes lying within the flux and reflux of the tides of the sea within plaintiff's said manor of Keysham, and with A. D. 1801.

A. D. 1801. his feet, &c. trod up, &c. the said earth, soil, and sand, in the second count mentioned, and with the feet of the said cattle in that count mentioned, and with the wheels of the said carts, &c. and with the keels of the said boats, &c. trod up the said other soil in plaintiff's last-mentioned closes in the said second count mentioned, and plaintiff's said other shell-fish and shells in the second count mentioned, broke, crushed, &c. and with spades, &c. dug and made holes, &c. and raised up and got up the said shell-fish and shells, &c. and took and carried away the same, and converted and disposed thereof, &c. when the last-mentioned closes in which, &c. were left dry and were not covered with water, as plaintiff hath in the first and second counts of the said declaration complained against him, which several trespasses so above new assigned are other and different trespasses, &c. Wherefore, &c. To the new assignment the defendant pleaded, 1st, the general issue; 2dly, "that the said closes first above newly assigned, and the several closes secondly above newly assigned are, and at the said several times, &c. were the same closes and not other or different closes, and are at those times, when, &c. were certain rocks and sands of the sea, lying within the flux and reflux of the tides of the sea; and that the said shell-fish and shells in the said closes in which, &c. were certain shell-fish and fish-shells, which at the said several times when, &c. were in and upon the said rocks and sands of the sea, and which but a little before the said times when, &c. were by the ebbing of the tides of the sea left there in and upon the said closes in which, &c.; and that in the said closes in the said declaration mentioned every subject of this realm at the said several times when, &c. of right had, and of right ought to have had, and now hath, and of right ought to have the liberty and privilege of getting, taking, and carrying away, the

shell-fish and fish-shells left by the said ebbing of the tides of the sea in and upon the said closes, in which, &c. wherefore the defendant being a subject of this realm, at the said several times, when, &c. entered into the said closes in which, &c. to get, take, and carry away the shell-fish and fish-shells left by the ebbing of the tides of the sea in and upon the said closes in which, &c. and then and there got, took, and carried away the said shell-fish and shells in the said first count mentioned, and also got, and for that purpose with spades, shovels, mattocks, pickaxes, and other instruments, necessarily dug up and raised up, and took and carried away the other shell-fish and shells in the second count lastly mentioned; and for the getting, taking, and carrying away of the said shell-fish and shells, the defendant at the said times when, &c. entered the said closes in which, &c. as it was lawful for him to do by himself and with other persons, and with the said cattle, carts, waggons, and other carriages, and the said boats, lighters, and other vessels, the same being reasonable and proper and necessary in that behalf, and in so doing he necessarily and unavoidably with his feet, and the feet of those other persons in walking, a little trod up, trampled, subverted, and spoiled the soil, earth, and sand, in the said second count mentioned, and with the feet of the cattle, and with the wheels of the said carts, waggons, and other carriages, and with the keels of the said boats, lighters, and other vessels, a little trod up, trampled upon, tore up, subverted, and spoiled other the said soil of the said last-mentioned closes of the plaintiff, and the shell-fish and shells in the second count first mentioned, necessarily and unavoidably a little broke, crushed and destroyed, and with the said spades, shovels, mattocks, pickaxes, and other instruments, the same being useful, proper, and necessary in that behalf, in digging up, raising, and get- A. D. 1801.

A. D. 1801. ting the said shell-fish and shells in the said second count lastly mentioned, necessarily and unavoidably dug and made the said holes and pits in plaintiff's said closes, and necessarily and unavoidably with the said spades, shovels, mattocks, pickaxes, and other instruments, dug up, turned up, subverted, and spoiled a little of the said earth, soil, and sand in the said closes, as it was lawful for him to do for the causes aforesaid, doing as little damage on that occasion as he could, which are the same, &c. whereof, &c. And this, &c. wherefore, &c." To this plea there was a replication, traversing the right of every subject to take shell-fish and shells, and a special demurrer thereto, because it traversed matter of law: but the Court seeming to think that the replication was clearly bad, it was abandoned by the plaintiff's counsel, who relied upon objections to the plea.—*Marshall*, Sergt. in support of the plea. The question is, whether every subject of the realm has a right to take the shell-fish and shells which are left upon the sea shore by the ebbing of the tides. The right of fishing in the sea is acknowledged by all nations; it is universal, and part of the law of nations. Grotius de Jure Bel. ac Pac. lib. 2. c. 2. s. 3. And according to Grotius no person can have any property either in the main sea, or in the principal arms of the sea; neither can a man have any property in the shores and sands of the sea: these are all incapable of improvement, and never can be exhausted by the only uses to which they can be applied, namely, those of supplying fish and sand. Bracton (lib. 1. c. 12. fo. 7. b.) adopting the doctrine of the civil law, says, "Naturali vero jure communia sunt omnia hæc, aqua profluens, aer, et mare, et littora maris, quasi maris accessoria; nemo enim ad littus maris accedere prohibetur dum tamen a villis et ædificiis abstineat: qui littora sunt de jure gentium communia sicut et mare." And

he adds, "Publica vero sunt omnia flumina, et portus; ideoque jus piscandi omnibus commune est in portu et in fluminibus; riparum etiam usus publicus est de jure gentium sicut ipsius fluminis." So Sir Mathew Hale, in his Treatise de Jure Maris, part 1. cap 4. Hargrave's Law Tracts, p. 10, 11. observes, "In the sea the King of England hath a double right, namely, a right of jurisdiction, which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. The king's right of propriety or ownership in the sea is evidenced principally in these things that follow: 1st. The right of fishing in this sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. But though the king is the owner of this great waste, and as a consequent of his property hath the primary right of fishing in the sea, and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof as a public common of piscary; and may not without injury to their right be restrained of it unless in such places, creeks, or navigable rivers where either the king or some particular subject hath gained a propriety exclusive of that common liberty." In the same treatise, p. 12. it is said, "that de jure communi between the high water and low water mark, doth primâ facie belong to the king; Constable's Case, 5 Co. 107. and Dyer, 326. b.; although it is true that such shore may be and commonly is parcel of the manor adjacent, and so may belong to a subject, yet primâ facie it is the king's." From Constable's Case, 5 Co. 107. 2 Rol. Abr. 170. it appears that the shore may belong to the subject either in gross or as parcel of his manor: but merely being the manor of a particular

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A. D. 1801. person is not sufficient to exclude those who have a right to fish there. One may have a manor and another the right of fishing in the water; but if a man would claim a right of fishing in the water of another, the proof of the right lies upon him. In Warren v. Mathews, 6 Mod. 73 1 Salk. 357. S. C. Holt, Ch. J. says, "Every subject of common right may fish with lawful nets in a navigable river as well as in the sea; and the king's grant cannot bar him thereof." So in 1 Mod. 105. Lord Fitzwalter's Case, Hale, Ch. J. says, "In case of a river that flows and reflows, and is an arm of the sea, there prima facie it is common to all: and if any one will appropriate a privilege to himself the proof lieth on his side; for in case of an action of trespass for fishing there, it is a good justification to say that the locus in quo est brachium maris in quo unusquisque subjectus Domini Regis habet et habere debet liberam piscariam. The soil of the river Thames is in the king, and the lord mayor is conservator of the river, but it is common to all fishermen, and therefore there is no contradiction in the soil being in one, and the right of fishing in the river common to all fishermen." Again in Ward v. Creswell, Willes' Rep. 265. 16 Vin. Abr. 354. tit. Piscary, B. S. C. the Court held that all the subjects of England of common right might fish in the sea, it being for the good of the commonwealth, and for the sustenance of all the people of the realm; and that therefore a prescription for it as appurtenant to a particular township was void, and as absurd as a prescription would be for travelling the king's highway, or for the use of the air as appurtenant to a particular estate. The Statute 7 Jac. I. c. 18. after stating in the preamble that divers persons having lands adjoining to the sea coast in the counties of Devon and Cornwall, had of late interrupted the bargemen and such others as had used at their free wills and

pleasures to fetch sea-sand, and take the same under the full sea mark, as they had theretofore used to do, enacts that all persons in the said counties should be at liberty to take sea-sand at all places under the full sea mark. That statute was in fact a full recognition of the right of the subject to use the shore of the sea in every way in which it could be serviceable to him. It proves that his right is not confined to the privilege of taking of shell-fish left on the shore by the ebbing of the tides, but that he may also take the fish-shells, and even the sand of the shore.—*Best*, Sergt. contra. Admitting the general right of the subject to take the fish of the sea, still in this case that general right is circumscribed by the circumstance of the place in which these shell-fish and fish-shells were taken, being part of the manor of Keysham. Unless therefore the defendant set up a right of common on the soil, he cannot support the easement which he claims. Prima facie the shores of the sea belong to the king, and he may grant any part of them to a subject either reserving or not as he pleases a general right of fishery to all his subjects. The plaintiff ought not to be called upon to prescribe for a right of fishery over that which is admitted to be his own, for when once it is established that the locus in quo belongs to the plaintiff, it must be presumed to be exclusively his, unless some inconsistent right is set up by the defendant. The common law right of the subject to go upon the shores of the sea between high and low water mark only applies to cases where no exclusive right is vested in any individual. Now it appears from the passage cited from Hale's Treatise, Hargrave's Tracts, p. 12. that an exclusive right to the shore may belong to a subject, though prima facie it is in the king. Indeed in pages 26 and 27 of the same tract, Sir Mathew Hale, speaking of the sea-shore, says, "It

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A. D. 1801. may not only belong to a subject in gross, which possibly may suppose a grant before time of memory, but it may be parcel of a manor," and proceeds to mention the several ways by which such a right may be evidenced. To the same effect is Com. Digest, tit. Navigation, A. and the Case of the Abbot of Ramsay, Dyer, 326. b.; and the same is admitted by Lord Mansfield in the Case of Carter v. Murcot, 4 Burr. 2164. Although, however, the common law right of the subject should be established to take sea-fish, yet it by no means follows that the subject has a right to take the shells which are thrown upon the sea-shore. It is well known that in many parts of England much of the various matter which is deposited upon the shore by the sea, belongs to the owners of the adjacent soil, and is disposed of by them to very great advantage. The Statute 7 Jac. 1. which has been cited in support of the right of the subject to take whatever is found between high and low water mark, seems to afford a contrary inference; for it is to be observed that it is an enacting and not a declaratory law, and that a peculiar privilege is thereby granted to the men of Devon and Cornwall, which peculiar privilege it would have been absurd to grant if all the people of England had been entitled thereto by common law. The Court were of opinion that if the plaintiff had it in his power to abridge the common law right of the subject to take sea-fish, he should have replied that matter specially, and that not having done so, the plaintiff must succeed upon his plea as far as related to the taking of the fish; but observed that as no authority had been cited to support his claim to take shells, they should pause before they established a general right of that kind. They therefore offered to allow the defendant to amend his plea without costs, by striking out his

claim to the fish-shells, and shaping his justification in such way as he should be advised. Which offer was accordingly accepted. A. D. 1801.

The King v. Picton. 2 East's Rep. p. 195. A. D. 1802.

A conviction on the Game Laws, removed into this Court by certiorari, was as follows: (Surrey.) Be it remembered, that on the 16th of September, in the 41 Geo. 3. &c. at, &c. W. D. of, &c. came before me, J. B. one of the justices, &c. and then and there gave me the said justice to be informed that one Cæsar Picton, of, &c. within three months last past, to wit, on the 16th of this same month of September, in the said 41st year, &c. the said Cæsar Picton not then having lands or tenements, &c. (negativing the qualifications in the Statute 22 and 23 Car. 2. c. 25.) did, at, &c. keep and use a certain gun to kill and destroy the game, against the form of the statute, &c.; whereupon the said C. P. afterwards, to wit, on the same 16th day of September, in the 41st year, &c. at, &c. had notice of the said information and of the offence therein charged upon him as aforesaid, and was then and there by me the said justice in due manner summoned to appear before me the said justice at, &c. to make his defence to the said charge contained in the information aforesaid. And thereupon afterwards, *viz.* on the 26th of September, in the 41st year, &c. at, &c. he the said C. P. being daily summoned as aforesaid in this behalf, before me the said justice, appeareth and is present, in order to make his defence against the said charge, &c., and having heard the same, he the said C. P. is asked by me the said justice if he can say any thing why he should not be convicted of the premises above charged upon him in form aforesaid; who pleadeth that he is not guilty of the said offence. Whereupon I the said justice, at the same time and place,

If the convicting magistrate give a proper date to the time of the conviction upon the face of it, and afterwards add an impossible date to the time when he set his hand and seal to the conviction (being before the offence committed), the latter may be rejected as surplusage. It is enough that the conviction sets forth that the witness was examined on oath, without stating that the magistrate had authority to administer the oath.

A. D. 1802. *viz.* on the said 26th of September, in the year aforesaid, at, &c. do proceed to examine into the truth of the said complaint contained in the said information in the presence and hearing of the said C. P. And thereupon one credible witness, to wit, J. C. of, &c. cometh before me the said justice, and before me the said justice upon his oath, &c. by me the said justice administered, in the presence and hearing of the said C. P. deposeth, &c. that the said C. P. on the said 16th day of September, in the year aforesaid, at, &c. did keep and use a certain gun to kill and destroy the game. (And then proceeded to negative severally the defendant's qualifications according to knowledge or belief.) And the said C. P., although called upon for that purpose, doth not prove that he was qualified to keep and use the said gun for the purpose aforesaid by any of the means hereinbefore mentioned; nor shew any reason to me the said justice why he should not be convicted of the said offence: nor does he offer any evidence whatsoever before me, or require time for the production thereof: and thereupon I the said justice do adjudge that the said C. P. was and is unqualified, and guilty of the offence aforesaid. And therefore the said C. P. on the said 26th of September, in the year aforesaid, at, &c. before me the same justice, by the oath of the witness aforesaid, according to the form of the statute, &c. is convicted thereof; and for his offence aforesaid hath forfeited 5*l.* to be distributed as the statute, &c. directs. In witness whereof, I the said justice to this present record of the conviction aforesaid have set my hand and seal at, &c. the 4th day of November, in the year aforesaid. J. B. (L. S.)—*Manley* took several objections to the conviction, the principal of which were, 1st, that the conviction was dated on the 4th of November, in the year aforesaid, which by reference must be taken to mean the 41 Geo. 3. and

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therefore before the offence committed, which was not till the 16th of September following. R. v. Kent, 2 Ld. Raym. 1516. And this cannot be rejected as surplusage, because the time of the conviction, as well as of the offence, ought to appear. Rex v. Pullen, Salk. 369. 2dly, It is not stated that the magistrate had jurisdiction to administer the oath. The Court said, that as to the first objection, it was expressly stated that the offence was committed on the 16th of September, 41 Geo. 3. and that the magistrate after summoning the defendant and examining the evidence, &c. on the 26th of the same September, convicted the defendant of the offence. What follows therefore as to the date of setting his hand and seal is insensible, and may be rejected as surplusage. That it was immaterial when he put his hand and seal in point of form to the conviction. That as to the other objection, the conviction was in the common form in which many others were drawn. The act of parliament gives the magistrate authority to administer the oath in that respect.—*Marryat* was to have argued in support of the conviction. Conviction affirmed.

Lee v. Clarke. 2 East. Rep. p. 533.

In debt for a penalty on the Game Laws, the declaration stated, that Daniel Lee, within the space of six calendar months next before the commencement of this suit, to wit, on the 21st of January, 1801, at, &c. unlawfully used a certain engine called a snare, to kill and destroy the game of this kingdom, he the said Daniel, not being then and there qualified by the laws of this realm, nor having any lawful authority so to do; whereby, and by force of the statute in that case made and provided, an action hath accrued to John Clarke, to demand and have of and from the said Daniel five pounds. Plea, Nil debet. After verdict and judgment

In an action on a penal statute the declaration must allege the fact to be done contra formam statuti, or statutorum, as the case may be: stating that by force of the statute an action accrued, &c. is not sufficient, where the pe-

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for the plaintiff, below in C. B. a writ of error was brought in this Court, and the following errors assigned:—1. That the supposed offence is not alleged to have been committed against the form of any statute or statutes, not being an offence at common law. 2. That the supposed cause of action is alleged to have accrued to the plaintiff below, by force of the statute in that case made and provided; whereas the same accrued, if at all, by force of several and different statutes, made in different sessions of parliament, and not by any one statute. 3. That the plaintiff below commenced this suit against the defendant before the cause of action mentioned accrued. 4. That the cause of action is therein stated to have accrued within six calendar months next before the commencement of the suit; whereas by law an action upon such cause of action, ought to be brought within six lunar months next after, &c. 5. It is not averred in the declaration that the plaintiff below commenced his suit before the end of the second term after the supposed offence committed. Nor, 6. That he was the first person who sued the defendant for the said penalty.—*Dampier*, for the plaintiff in error. 1. No offence is stated at common law, nor averred to be done against any statute: it is only said that the statute gives the action. Now the statute which gives the action is not the same which constitutes the offence. The penalty is given on summary conviction by the Statutes 5 Ann. c. 14. and 9 Ann, c. 25. Then the Stat. 8 Geo. 1. c. 19. gives an action to a common informer to recover half the penalty. And lastly, the Stat. 2. Geo. 3. c. 19. s. 5. gives the whole penalty to the informer, which is now sought to be recovered. Therefore, the present action is founded in part upon all the statutes. A statute may, for a thing actionable at common law, give an action to another than the party who could have sued at common law; as in

A penalty is given by one statute, and the right of action to the informer is given by another. Semble where the record was entitled generally of Hil. 41 G. 3. and the fact was laid under a viz: on 21st of January, 1801, whereas the return of the capias must have been at latest on 30th January, and so the suit appeared to be commenced before the cause of action, contrary to the averment in the declaration; such repugnancy is no ground of error. Semble if a statute gives an action within six months after the fact committed (by which must be understood lunar months) and the declaration avers such fact within six calendar months before, it is no error; as it will be pre-

the case of the assignee of a bail bond, and in the case of a replevin bond: but here the offence which is not actionable at common law, is not averred to be so by the statute. It ought to have been alleged, that the thing done for which the penalty was given, was against the form of the statute. Formerly it was holden necessary to recite a statute where it created a new offence; Com. Dig. Action on Stat. G.; though now it is deemed sufficient for the declaration to shew a case within the statute; but still it must conclude contra formam statuti, 1 Ventr. 103; otherwise the question could never have arisen in many cases, whether the conclusion should have been contra formam statuti, or statutorum; for in either case it would have been surplusage. A penal action requires nearly the same strictness as an indictment (*a*). 2. The two Statutes of Ann give the penalty in this case, and two other statutes give the action as now framed, viz. the Stat. 2 Geo. 1. c. 19. gives the action to the informer for half the penalty, and the Stat. 2 Geo. 3. c. 19. s. 5. assuming that the action is given by the prior statute, enables the informer to sue for the whole penalty: but the provisions are not incorporated, as they are different with respect to costs; therefore the penalty and the form of action being given by different statutes, the conclusion ought to have been against the form of the statutes, and not of any single statute; according to Dingley v. Moore (*b*), and Broughton v. Moore (*c*), and Talbot's Case there cited. 3. The suit appears to have commenced before the cause of action accrued. The record is generally of Hil. 41 Geo. 3. and the day laid is the 21st January, 1801, whereas the return of the capias must have been at latest on the first return of the term, namely, the 20th January, the day before the cause of action is alleged. This action being commenced in C. B. the reasoning in Pugh v. Robinson (*d*), does not

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sumed after verdict that the fact was proved within due time, notwithstandingsuch irrelevant allegation. Semble that a declaration for a penalty on killing game in an action brought for the whole penalty on the Stat. 2 G. 3. c. 19. s. 5. and prior statutes need not allege the fact to have been committed within two terms before the action commenced, according to Stat. 20 G. 2. c. 2. the Stat. 2 G. 3. having allowed six months.

(*a*) Vide 2 Hawk. P. C. c. 25. s. 116, 117.

(*b*) Cro. Eliz. 750.

(*c*) Cro. Jac. 142.

(*d*) 1 Term Rep. 116.

A. D. 1802. apply; for the cause of action must in this case precede the return of the writ. 4. The offence is alleged to have been committed within six calendar months before the commencement of the suit; whereas the Stat. 2 Geo. 3. c. 19. s. 5. mentioning months generally, must be taken to mean lunar months; and therefore, consistent with this averment, which alone the plaintiff was bound to prove at Nisi Prius, he may have sued too late. And the averment cannot be rejected as a surplusage; because the action being founded on a statute, the plaintiff must aver every matter requisite to entitle him to the action. Com Dig. Action on Stat. A. 3. College of Physicians v. Bush, 4 Mod. 47.—Lord *Ellenborough*. Notwithstanding the allegation, that the offence was committed within six calendar months, &c. yet if it were not committed within the time prescribed by the statute before the commencement of the suit, the plaintiff must have been nonsuited.—*Lawrence*, Justice. The time having lapsed would have been evidence for the defendant on the plea of nil debet. The argument goes the length of assuming, that if no time whatever had been alleged, it would have been sufficient for the plaintiff, at Nisi Prius, to have proved the offence committed at any time before the action commenced; which cannot be pretended. It might, perhaps, have been requisite, if no time had been alleged, to have proved the offence committed within six lunar months before; but there being a direct averment of another period, it would have been a sufficient answer to the objection, if the proof had referred to a period beyond the six lunar months, but within the six calendar months, to have said that the plaintiff was only bound to prove what was expressly alleged; and that the objection, if any, was open upon the record. 5. It ought also to have been averred, that the action was commenced before the

end of the second term after the offence committed; to which period it is limited by the Stat. 26 Geo. 2. c. 3; and though the Stat. 2 Geo. 3. c. 19. says, within six months, yet that would not in all cases extend the time given by the former statute: so that the latter only operates as a repeal pro tanto; and both statutes are still in force, and must be taken to have limited the action to be commenced within six months, provided it do not extend beyond two terms. The words in the last statute are negative words, and not words of extension. The 6th error is not material to be insisted on. —*Wood*, contra. 1. In an action on a penal statute, it is not necessary to aver that it is contra formam statuti; it is sufficient if so much be stated as brings the case within some public statute. As was said in Coundell v. John (*a*), that "where a statute introduces a new law, by giving an action where there was none before, or by giving a new action in an old case, the plaintiff need not conclude contra formam statuti:" but if a statute give the same action with a difference of some circumstances, as double damages, &c. the plaintiff must either conclude, contra formam statuti, "or make his case so particularly within the statute, that it may appear to be so." In another report (*b*) of the same case, Lord Holt is made to say, "If no action lies at the common law, and you may have an action by a general statute, then if you bring yourself within the description of such statute, you need not conclude contra formam statuti: so it was agreed in the year 1656, when Roll and Newdigate sat here." The cases cited contra are indictments or informations, which differ from the present. But if it be necessary to shew that the action is framed on a statute, the conclusion here, "whereby and by force of the statute in that case made, and action hath accrued," &c. is sufficient for that purpose. 2. The action given to this plaintiff to sue, is only by one

A. D. 1802.

(*a*) Salk. 505.

(*b*) Holt's Rep. 634.

A. D. 1802. statute; and therefore the conclusion in the singular number is proper. The penalty indeed was created by the Stat. 5 Ann.; but the plaintiff sues only upon the Stat. 2 Geo. 3. c. 19. s. 5.—*Le Blanc*, Justice. Would you have been satisfied to have added that statute after the averment in the count? 3. There is a positive allegation that the fact was committed before the commencement of the suit; therefore, at most, there is only a repugnancy of date, which is no error, but may be rejected as surplusage. Adams v. Goose, Cro. Jac. 96. 4. This error assigned is repugnant to the last; for as that stated that the suit was commenced before the cause of action accrued, that it was not commenced soon enough after the cause of action accrued; for that it is only alleged within six calendar months, whereas it should be brought within six lunar months. But the answer already given by the Court is sufficient: the allegation itself was unnecessary, and may be rejected; and after verdict the Court will presume that the fact was proved within due time. 5. It was not necessary to allege the action commenced within two terms, as well as six months, which is the period allowed by the last statute: but at any rate the answer last given will equally apply to this objection. 6. If this plaintiff were not the first who sued for the penalty, that should have been pleaded in bar.—Lord *Ellenborough*, Chief Justice. To some of the errors assigned, an answer has already been given by the Court: such as those with respect to the allegation of the time within which the action was commenced, being stated to be within six calendar instead of lunar months, and not stated to be within two terms. The allegations were not material; and we cannot now presume that the fact was not proved to have happened within the time prescribed by law for the commencement of the suit. It also strikes me that there is no weight in the third error assigned. A repugnancy of date on

the record is no error: the Court will suppose that the cause of action existed, as it is averred, before the action was commenced. But I cannot so well dispose of the first error, that the offence for which the penalty is given is not alleged to be against the form of the statute; it being clear that this was no offence at common law, and only made so by the statute. Such an averment has always been considered necessary; otherwise the cases alluded to, which turned on the distinction between such averments in the singular or plural number, according as the offence arose out of one or more statutes, could never have arisen; for the answer would have been, that either was unnecessary. The only authority which seems to bear the other way, is that referred to in Salkeld: but that was not a penal action. It does not distinctly appear but that the subject matter might have been a ground for an action at common law. But at most, it is an anomalous case, against the current of authorities. Also as to the second error, it might admit of considerable question whether it should not have been laid against the form of the statutes, where the right of action is given by more than one statute. What was said by Warburton, Justice, in Owen. 135. is an express authority in point to this purpose: "If a statute doth prohibit a thing, and another statute give a penalty, there, upon an information upon the penalty, both statutes ought to be recited, and to conclude contra formam statutorum: but where the statute is only revived, it is otherwise." However, I do not proceed on this objection. I rest on the first, that in an action for a statute penalty by a common informer, as well as in proceedings by indictment or information, it has been invariably holden that the fact must be alleged to be done against the form of the statute. Some or all of the statutes referred to are essential to the maintaining of this action; and I do not see

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A. D. 1802. such circumstances stated as brings the case within any of them, without alleging it to be against the form of the statute.—*Grose*, Justice. I have always understood, that it was necessary to allege the fact to be against the form of the statute in the case of penal actions as well as indictments.—*Lawrence*, Justice. As to the first error assigned, that the count does not conclude against the form of the statute, I have always understood that to be necessary in these cases. In the case of indictments, to which this bears a close analogy, there is no question but it is so (*a*). The reason of which is, that every offence for which a party is indicted is supposed to be prosecuted as an offence at common law, unless the prosecutor by reference to a statute shews that he means to proceed upon it: and without such express reference, if it be no offence at common law, the Court will not look to see if it be an offence by statute. This rule is laid down in Doctrina Placitandi, 332. (a book which has always been admitted to be of great authority in pleading, and was often quoted by Lord Chief Justice Willes,) "that if an action be brought on a statute, the plaintiff ought to rehearse the special matter, and say that the action is brought contra formam statuti." For which is cited the Year Book, 9 Ed. 4. 26. But it is contended, that the conclusion here "whereby and by force of the statute an action hath accrued," &c. will supply the want of the other allegation. If it had said statutes in the plural number, perhaps that might have done: but it certainly is not sufficient with reference only to the Stat. 2 Geo. 3. c. 19.; because that alone would not support the action. As to the other objection, upon the repugnancy of the declaration being intitled generally, &c. that might, I think, be gotten rid of as surplusage. It is no error.—*Le Blanc*, Justice. I do not see how the first objection can be gotten over. The practice

(*a*) Vide 2 Hawk. P. C. c. 25. s. 116.

has always been to have such an averment; and a contrary determination in this case might let in a laxity of pleading not only in civil actions, but also in criminal proceedings. Judgment reversed. A. D. 1802.

The next day Lord *Ellenborough* said, that the Court had looked more particularly into the cases of Coundell, or Kendall v. John, which is reported in Salk. 505. Holt. Rep. 632—5. and Fortes. 125; and upon comparing them, there did not appear to be that incongruity between that case and other authorities, which they had at first apprehended. In Holt's Rep. 635. the Chief Justice on finally giving the judgment of the Court, said, "I do agree that you need not in an action on the statute conclude contra formam stat. but you must not say, de placito transgressionis super casum; yet you must say, de placito transgressionis et contemptus contra formam stat. and bring yourself within the description of the statute." And in Fortescue's Rep. Lord Chief Justice Holt is made to say, "you need not recite the statute itself if it be a public law, if you bring yourself within the law: and if you do not conclude contra formam statuti, you must shew it at least by concluding de placito transgressionis et contemptus." It appears therefore to have been the ultimate opinion of the Court, that in all cases where the action is founded on a statute, it is necessary in some manner to shew that the offence on which you proceed is an offence against the statute.

Hardyman v. Whitaker et al'. 2 East Rep. p. 573.

A joint action may be maintained against several, to recover a penalty upon the Game Laws.

By the Stat. 12 Ann. c. 14. s. 4. it is enacted, that if any person not qualified by the laws of the realm so to do, shall keep or use any greyhounds, setting-dogs, haves, lurchers, tunnels, or any other engine to kill and destroy the game, and shall be thereof convicted by a justice of the peace, &c. the person or persons

A. D. 1802. so convicted shall forfeit the sum of 5*l.*; one half to the informer, and the other half to the poor of the parish, to be levied by distress and sale, &c. And by the Stat. of 8 Geo. 1. c. 19. it is enacted, that wherever any person shall for any offence to be hereafter committed against any law now in being for better preservation of the game, be liable to pay any pecuniary penalty upon conviction before any justice of peace, it shall be lawful for any other person whatsoever, either to proceed to recover the said penalty by information and conviction before a justice of peace, or to sue for the same by action of debt or on the case, bill, plaint, or information, in any of his majesty's courts of record, wherein the plaintiff, if he recover, shall have double costs: provided that all suits and actions to be brought by force of this act shall be brought before the end of the next term after the offences committed: but no person to be doubly prosecuted for the same offence. By virtue of these statutes a joint action of debt was brought against the defendants, Whitaker and eight others, to recover one penalty of 5*l.* as forfeited by the said Stat. 5 Ann. The memorandum on the record being of Trinity Term; and the declaration charging that before the exhibiting the bill, viz. on 27th January, the defendants keep a lurcher to kill and destroy the game. The defendants pleaded nil debet. The jury found as to six of the defendants, that they do owe to the plaintiff 5*l.*; and as to the other three, that they owed nothing. Upon this there was a motion in arrest of judgment, and three objections made. 1. That it appears by the memorandum of the record that this suit was commenced in Trinity Term: and the declaration states the offence to have been committed on the 27th of January preceding; so that the action appears upon the record itself to have been commenced after the time limited by the Act of Parliament. 2. That this being an action of debt, is a

joint action against all the defendants; and the jury having discharged three of them, their verdict has destroyed the plaintiff's action. 3. That a joint action as this is, cannot for this matter be maintained against several. 2 Roll. Abr. 81. pl. 6. Brooke's Case: If four persons are indicted that they, et eorum uterque, used the trade of a plumber contra Stat. 5 Eliz. it is not good: for that the user of one cannot be the user of another. S. P. East. 11 Geo. 1. The King v. Weston, indictment against two, charging them jointly for exercising a trade, is bad. But the Court, after argument and consideration, over-ruled all the objections. As to the 1st objection: though it do not appear that the bill was filed before of Trinity Term, yet non constat but there was a prior commencement of the action by suing out a latitat; which is said to be the truth of the case; and the suing out a latitat is a sufficient commencement of the suit to save the limitation of time, in an action for a penalty forfeited by the statute; as was resolved by three judges in the Case of Culliford v. Blandford, Carth. 252.; and therefore this is not to be compared to the cases where the exhibiting the bill appears to be the commencement of the action, and the cause of action arises subsequent to the memorandum. As to the second objection, this action is not to be considered as founded on a contract, but on a tort, which is joint and several: and for this the case of Bastard v. Hancock, Carth. 361. is in point; where in an action of debt on the statute against several defendants for not setting out tithes, the jury found for the plaintiff against one defendant only; and as to the others nil debent: and this very objection taken in arrest of judgment, but overruled; for that the action being founded on a tort, and not on a contract, not culpabilis would have been a good plea; and therefore one of the defendants may be found guilty and the others acquitted, as in other

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A. D. 1802. actions upon torts. As to third objection, there is no doubt but that the law allows the charging several persons as joint offenders: and in this case the statute itself has considered several as capable of being joint offenders; for it says that if any person or persons shall keep lurchers and be thereof convicted, the person or persons so convicted shall forfeit 5*l*. So that it gives one penalty of 5*l*. to be paid by the person or persons who act against the statute. The statute has therefore made it a joint offence in all persons concerned, and has made them all subject but to one forfeiture, and they are consequently within the rule of the common law punishable jointly. And therefore the case in Roll. Abr. and the Case of the King v. Weston, will not govern the present; for the penalty in the Statute 5 Eliz. is laid upon every person offending; and therefore in the Case of the Queen v. Atkinson, 2 Ld. Raym. 1248. and Salk. 382. upon an objection of this kind taken to an indictment against two persons for extorting money as receivers of the land-tax colore officii, and supported by the above case in Roll. Abr. it was resolved to be an offence which two might join in, or it might be several, as in trespass: but otherwise of exercising a trade; for per Holt, the forfeitures are distinct, and that which makes the crime is several, viz. the not having been apprentice. But that is not the case at present where the statute itself has made the offence joint: and the distinction is where the offences are made joint and where not; as in the Case of Partridge v. Naylor, Moor. 453. in an action of debt on the Stat. 1 and 2 Phil. and Mary, for impounding a distress in divers pounds brought against three, who being found guilty, damages of 40*s*. a piece were assessed and trebled by the Court to 6*l*. a piece, and 5*l*. a piece forfeiture by the statute: and though the words of that statute are, that every person offending shall forfeit to the party grieved 5*l*. and

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treble damages; yet upon error, the Court, after several arguments, reversed the first judgment; for that the words, "every person offending," are not to be referred to the severalty of the persons, but of the offences; and as they all three offended in one joint fact, there ought to have been but one 5*l.* forfeited; and in the Case of the Queen v. King, Salk. 182. where two were convicted of deer stealing, and judgment that each should forfeit 30*l.* and because this penalty is not in nature of a satisfaction to the party grieved but a punishment on the offender, and crimes are several though debts be joint, and therefore distinguished it from the Case of Partridge v Naylor. For which reason the Court gave judgment for the plaintiff.

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The King v. Tolley. 3 East's Rep. p. 467.

A conviction on the 4th s. of the Stat. 5 Ann. c. 14. for keeping a dog and gun to kill game without being qualified must be made within three months after the offence committed; and if the hearing of the matter be adjourned over that time, though with the consent of the defendant, a conviction afterwards is bad.

A conviction, returned into this Court by certiorari, set forth, that on the 8th of September, 42 Geo. 3. F.B. who prosecuted, &c. came before S. T. Esquire, a justice of peace, &c. and informed him, "that within three months now last past, viz. on the 7th of September, 42 Geo. 3. at the parish of D. in the county of Worcester, one John Tolley, the defendant, of E. &c. in the said county, farmer, being a person not then having lands, &c. (negativing the several qualifications for killing game mentioned in the statute,) nor then being game-keeper of any lord, &c. of any manor, &c. duly constituted, &c. to kill game, nor then being truly a servant of any lord, &c. of any manor, nor then being immediately employed or appointed to kill game for the sole use or immediate benefit of any lord, &c. nor then being in any manner qualified to kill game or keep any dog or engine to kill game, &c. did keep and use a certain engine called a gun and three setting-dogs to kill the game, in the said parish of D. &c. contrary to the form of the statute, whereby and by force of

A.D. 1803. the statute he has forfeited 5*l*." The conviction then set forth a summons of the defendant, and his appearance on the 11th of September, when he pleaded not guilty, and that a witness examined on the part of the informer proved the offence in the manner therein stated to have been committed, on the 7th of September, 42 Geo. 3. Whereupon the defendant being called upon by the said justice for his defence, he duly proved the execution of the following deputation by G. P. Esquire, lord of the manor of E. in the parish of D. aforesaid, and the certificate of the enrolment thereof with the clerk of the peace, &c. · The deputation, dated in September, 1784, was then set forth in the usual form, wherein the lord of the manor of E. appointed the defendant therein described as of E. aforesaid, farmer, to be his game-keeper, with authority during the lord's pleasure to kill game, &c. upon his said manor of E. And it was admitted by the informer that the gun and dogs were kept and used within the manor. The defendant then also produced a game-certificate with a three guineas stamp, but no certificate of his appointment of game-keeper, nor any other proof of his qualification to kill game. It then stated, that at the instance of the informer and with the consent of the defendant the further hearing of the matter was adjourned to a future day to be named by the justice; "and that afterwards, on the 23d of December, 43 Geo. 3. the defendant was again summoned to appear before the said justice on the 27th of the same December, at, &c. on which day, the defendant not appearing, and proof of the summons being made, &c. the justice adjudged that the defendant within three months next before the said information, viz. on 7th September, 42 Geo. 3. at, &c. being a person not having any lands, &c. (negativing his qualifications) nor then being game-keeper of any lord, &c. (as before,) did keep and use a

certain engine called a gun and three setting-dogs to kill the game, &c. And therefore the said justice on this 27th of December, 43 Geo. 3. at, &c. did convict the defendant of the offence aforesaid, &c. and adjudged that the defendant for his offence aforesaid had forfeited 5*l.* to be distributed, &c. In witness whereof the justice set his hand and seal, at, &c. the 27th of December 43 Geo. 3." (Signed and sealed by the convicting magistrate.)—*Peake*, for the defendant, first objected to the conviction, that it proceeded upon the Stat. 5 Ann. c. 14. for the penalty of 5*l.* for killing game without being duly qualified; whereas it appears upon the evidence that he was duly appointed a game-keeper by the lord of the manor, as provided for by the same statute, s. 4.—The Court then called upon *Wood*, in support of the conviction. If the defendant were not legally constituted a game-keeper, then he cannot protect himself as such from the penalty of the Statute of Queen Anne. Now the Stat. 3 Geo. 1. c. 11. reciting the former law, "and that under colour and pretence of the authority to kill game for the use of the lords, &c. of manors, it was become usual for lords, &c. of manors to grant deputations to the farmers, tenants, and occupiers of the lands lying within their manors to be game-keepers, which practice was a great abuse of the said act, and tended to a destruction of the game; for remedy thereof enacts, that no lord, &c. of any manor shall appoint any person to be a game-keeper, with power to kill game, unless such person be qualified by law so to do, or unless such person be truly and properly a servant to the said lord, &c. or be immediately employed or appointed to kill game for the sole use or immediate benefit of the said lord, &c. and not otherwise. And that no lord, &c. of a manor shall qualify any person, not being qualified by the laws of this realm so to do, to kill game, &c. or keep any greyhound,

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A. D. 1803. &c. or any other engine to kill game. And that any person not being qualified, &c. or not being truly and properly a servant of any lord, &c. (as before) who under colour or pretence of any deputation, &c. by any lord, &c. of a manor shall kill any game, &c. or keep or use any greyhound, &c. or any other engine to kill game, being thereof legally convicted, shall for every such offence incur such forfeitures, &c. as are appointed by the Stats. 5 Ann. c. 14. and 9 Ann. c. 25.; such forfeitures to be recovered by such means, &c. and within such time, &c. as are prescribed by the said acts; any thing in the said acts or in any other law, &c. to the contrary notwithstanding." Now here there was no evidence that the defendant was duly qualified; and in the deputation itself he is described as farmer, and is one of the description of persons particularly pointed out by the latter statute, to whom a deputation shall not be granted. And the production of the three guineas certificate, which is a different certificate from what is required by the Act of the 25 Geo. 3. c. 50. to be taken out by deputed game-keepers, shews that he was not acting at the time under that deputation, but claiming to kill game in his own right: and he never took out a certificate as game-keeper.—The Court intimated some doubt whether, though the defendant might not be a legal game-keeper with power to kill game under the Stat. 3 Geo. 1. yet whether he might not be a legal game-keeper to keep a dog or gun for that purpose within the Stat. of Anne.—Though Lord *Ellenborough* afterwards noticed the provision at the conclusion of the clause referred to in the Stat. 3 Geo. 1. that such persons should incur such forfeitures as are appointed by the Stat. of Anne.—When *Grose*, Justice, observed, that by the 2d section of the Stat. 5 Ann. c. 14. it is provided, that the conviction shall be made within three months after the offence committed; and here it ap-

pears to have been made long after that period; though the information is stated to have been made within that period.—*Wood*, (after some interval which he prayed to look into the act,) observed, that the limitation of time was confined to the clause respecting higlers and others having or offering to sale, &c. game in their custody, who are liable to be convicted for every such offence in 5*l*. ; and the words of the 2d clause limiting the time of prosecution are "provided that such conviction" (which must relate to a conviction for the offences before described) "be made within three months after such offence committed." But the offence for which the defendant is convicted arises out of the 4th clause of the statute, which has no limitation of time for the conviction, nor any direct words of reference to the former clause.—*Peake*, contra, said, that the 4th clause speaks of persons "convicted as aforesaid," which may as well refer to the manner and time of conviction mentioned in the antecedent clause as to any other matter in the same clause: but that at all events the doubt was gotten rid of by the subsequent Statute of the 9 Ann. c. 25. which recites and makes perpetual the Stat. 5 Anne, except as thereby altered; and then provides that no lord, &c. of a manor shall appoint above one person to be a game-keeper within any one manor with power to kill game; and that the name of such person shall be entered with the clerk of the peace; and that in case any other game-keeper whose name shall not be so entered, who shall not be otherwise qualified, &c. shall kill game, &c. he shall for every offence incur such forfeitures, &c. as are inflicted by the said recited act upon higlers, &c. "such forfeitures to be recovered by such means, and in such manner and form, and within such time, &c. as are prescribed by the said act."—The Court said, that this got rid of all doubt on the subject, and shewed that the conviction must be

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Molton v. Rogers. 4 Esp. Rep. p. 215.

The penalty under the game certificate act. for not producing a licence when lawfully required is not complete by the refusal to produce it, unless the party refuses, on request, to tell his christian and surname, and the place of his residence.

This was an action of debt, on the Stat. 25 Geo. III. c. 50. sect. 15. brought to recover the penalty for not producing the certificate entitling the party to kill game, as required by that statute. It is by that statute enacted, "That if any person should be found using a dog, gun, &c. or other engine, for the destruction of game, by any other person who has obtained a certificate, it shall be lawful for any person producing such certificate as is required by the act, to demand and require the person so using such gun, to produce and shew the certificate issued to him for the purpose aforesaid; and every such person shall, upon such demand or requisition, produce such certificate to the person demanding the same: and permit the same to be inspected accordingly: and if any such person shall wilfully refuse to produce or shew his certificate, or not having produced or shewn it, shall refuse, on demand thereof, to give his christian and surname, and place of his residence: or shall give any false or fictitious name or residence, he shall forfeit ten pounds." The evidence was, That a gentleman of the name of Slater, who was a qualified person, was out sporting with two greyhounds: that he was joined by Rogers, the defendant, whose father was qualified: that Rogers, when he came into the field and joined him, had with him a greyhound which belonged to his father: that the dog of Rogers, and one of Slater's, found and killed a hare: that Slater had sent and borrowed the dog of the defendant's father, in order to try him.—*Erskine* contended, That by the presence of Slater, and hunting in his company, the defendant Rogers, though unqualified, was protected: that the law

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put that trust into a person qualified, that he would not abuse his qualification; and therefore, while he was following that which the law allowed, the mere joining of an unqualified person, and partaking of the sport, was no offence by such person. *Erskine* further contended, that the mere act of not producing the certificate, was not of itself an offence: that by the words of the act, the penalty did not attach until the person who refused to produce the certificate had also refused to tell his christian and surname and the place of his residence. —*Garrow*, for the plaintiff, replied, That the offences were distinct: the one for not producing his certificate; the other for not telling his name, &c.—Lord *Ellenborough* read the words of the statute: "If any such person shall wilfully refuse to produce and shew a certificate, or not having produced and shewn such certificate, shall refuse, on demand, to give his christian and surname, and place of residence, every such person so offending, shall forfeit a sum of fifty pounds." His lordship then said, that the offences were not distinct; but that after a refusal to produce the certificate, it was necessary to ask for the party's surname and christian name, and his place of abode; the act intending that to be the medium of discovery of the person sporting without a certificate. Every man was not to be considered as using a dog, who merely participated in the sport: if that was so, no man, unless he was qualified, could join in the sport of the field, nor bring a servant with him; he must be himself a principal, such as the owner of the dogs. The question therefore was, Was this a loan of the dog to the qualified person; and was the defendant only partaking of the sport? If it was so, though the dog might be his, he was not liable to a penalty. His lordship then added, I am fortified in this construction of the act, by observing, that by the act only 20*l.* is given for not taking out a certificate;

An unqualified and unlicensed person may join in the sport with a person lawfully entitled to kill game, if he merely joins in the sport and is not himself a principal, or using his own dogs.

A. D. 1803. whereas the penalty, as it is contended for, for not producing a certificate when demanded, is 50*l*. A man who has not a certificate, and who of course cannot produce one, would be subjected to a penalty of 50*l*. though the not taking it out, subjects him only to 20*l*.; which seems to be absurd. Verdict for the defendant. —*Garrow* and *Smith* for the plaintiff.—*Erskine* and *Wigley* for the defendant.

Rex v. Walford. 5 *Esp. Rep. p.* 62.

Felony cannot be committed in stealing oysters off oyster-lays in an arm of the sea, though not produced there, but brought for sale.

This was an indictment against the defendant. The indictment charged, that the defendant feloniously stole half a peck of oysters off a certain laying of the plaintiff's, situated at Tollesfleet, in the county of Essex. The prosecutor of the indictment was the proprietor of certain oyster-beds or layings on the coast of Essex. Those beds are considered as private property: they are copyholds; and the proprietors are rated to the poor, and all other assessments within the parish. They are allotted out among different proprietors; and their respective beds are marked by beacons or long poles put into the ground; but they are all in an arm of the sea, and covered with the salt water; and the water there is navigable. The oysters are laid on these layings previous to their being put on the beds to fatten: they are caught in different parts of the coast and creeks, and purchased by the proprietors, for the purpose of being afterwards carried to the beds; very few, if any, being produced on the layings.—*Garrow*, for the defendant, objected: That this indictment could not, in point of law, be sustained; that either as to the place where the larceny was committed, or that which was the subject of it, the indictment could not be supported: that the place where they are laid was an arm of the sea, where all the king's subjects had a right to fish; that oysters were of that description, that felony could not be com-

mitted in the stealing; but that above all, the legislature had, by a Statute in 31 George III. c. 51. declared that this offence was a misdemeanour only; that after that construction of the legislature, the offence could never be construed to be felony. It was admitted by the prosecutor's counsel, that larceny could not be committed unless of personal chattels, and not that which was feræ naturæ; but they contended, that the oysters here were not the natural produce of the place, but were brought from different parts of the coast, where they were produced, at the expense of the proprietor, and laid on the beds for the purpose of being fattened, and improved for sale; so that there was as distinct a property in them as in any chattel: that as to the place being an arm of the sea, where all the king's subjects had a right to fish, in fact, the several proprietors had a distinct and several property in the oyster lays, marked out and distinguished by posts and boundary marks; that they were held of the adjoining manor, and were rated to the poor for them; and though it was admitted, that the act of parliament had declared the offence to be a misdemeanour, that did not prevent the party injured from proceeding for a felony, the remedy being cumulative.—Mr. Baron *Hotham* ruled, That the Statute 31 Geo. III. c. 51. having made the offence a misdemeanour only, had negatived the idea of a felony. He said, he had taken the opinion of some of the other Judges on the point, who were of that opinion: he therefore ordered the defendant to be acquitted.—*Trower* and *Espinasse* for the prosecution.—*Garrow* and *Marryatt* for the defendant. A. D. 1803.

Weld v. Hornby, Clerk. 7 *East Rep. p.* 195. A. D. 1806.

The plaintiff declared, upon his possession of a sole and several fishery, and also of a free fishery, and common of fishery in the several parts of the river Ribble, Under ancient deeds recognizing a right in the

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owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brushwood, through which it is possible for the fish to escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape through the weir is debarred, though in flood times the fish may still overleap it.

The enhancing, straitening, or enlarging of an ancient weir, as well as the new erection of one, for the purpose of stopping fish in their passage up a river, is treated as a public nuisance by Magna Charta, c. 23. and 12 Ed. 4. c. 7. and the right to convert a brushwood into a stone

which lay in the respective manors of Ribchester, Dutton, Aighton Bailey, and Chaigley; and also in that part of the river Hodder which lies in the last-mentioned manor, and which discharges itself into the Ribble: and then alleged, that the defendants wrongfully continued a weir or dam across the river Ribble, lower down the stream than the plaintiff's fisheries, per quod, salmon and other fish were prevented from coming to the plaintiff's fisheries, and from spawning there, &c. and the plaintiff could not enjoy his fisheries in tam amplo modo. One of the counts described the obstruction to be by continuing a weir or dam made larger, closer, firmer, and higher than it ought to have been, per quod, &c.; and another more generally. Plea, Not guilty. At the trial before Sutton, B. at Lancaster, it appeared that the plaintiff, who had been in possession of his estate about 29 years, was entitled to a right of fishery in the river Ribble above the defendant's weir, and that before the obstruction complained of, he had taken plenty of salmon and other fish within the limits of his fishery, but after the alteration in the defendant's weir there were but few fish to be taken at any time, and sometimes none. That till about 40 years ago, the defendant and the prior owners of Brockhole's mill had always had a brushwood weir across the river Ribble near the mill; and he shewed by old deeds, for two centuries back, that they had a right to have a weir across the river for the use and convenience of their fishery, which right was expressed in those deeds in large and general terms, not limited as to the heighth, or restricted as to the materials of the weir; but none of the witnesses could remember any other than a brushwood weir prior to the year 1766. At that period the then owner of Brockhole's mill erected a solid stone weir two-thirds across the river in lieu of the former brushwood, leaving the other third composed of the

same materials as before; to which it did not appear that any objection was made; and in 1784 the remaining third of brushwood was removed, and the stone weir carried quite across the river. This weir was a solid piece of masonry, (having three locks in it, as the former wooden weir had for the purpose of catching fish,) about ten feet broad, and nearly level at top, with a straight perpendicular side towards the fall of the river. There was a contrariety of evidence as to the relative heighth of the new to the old weir, but in the result it did not appear that the present stone weir was either broader or higher than the former brushwood weir, making reasonable allowance for the sinking of the latter after a time. The present action was brought within three months before the expiration of 20 years from the last alteration. The learned Judge directed the Jury to consider, first, whether the alteration of the weir, made in 1784, were injurious to the plaintiff's fishery in the stream above: and if it were, then, secondly, whether such alteration were made by the defendant in the exercise of his own right, as evidenced by the several deeds, shewing that the defendant and those under whom he claimed had a right to erect and preserve a weir at Brockholes; or whether there were any encroachment on the plaintiff's right by the alteration made 40 years ago, when a stone weir was erected two-thirds across the river, which had been acquiesced in without complaint, and by the completion of the weir with stone nearly 20 years before this action brought. And he told the jury, that if there had been an uninterrupted enjoyment of the weir in its present state for 20 years, this action could not be maintained; but that though less than 20 years did not of itself afford a conclusive presumption of right; yet that such a length of possession as had been shewn by the defendant, and of acquiescence on the part of the plaintiff,

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weir is not evidenced by shewing that 40 years ago two-thirds of it had been so converted, without interruption: and the action for the injury having been brought within 20 years after the remaining third part was so converted. 3 Smith. 244. S. C.

A. D. 1806. was certainly evidence of title, and connected with the other circumstances was evidence for them to say whether or not such a possession had a legal commencement or were an encroachment on the plaintiff's right. The Jury on this returned a verdict for the defendant, stating at the same time that they thought the alteration of the weir in 1784 was prejudicial to the plaintiff's fishery, but that the defendant's right was by length of possession and other evidence of title well established. In Michaelmas Term last it was moved to set aside the verdict, as contrary to the evidence of the actual injury sustained by the plaintiff from the alteration of the weir in 1784, and not warranted by any legal inference to be drawn in favour of the defendant's right from the ancient deeds, explained as they were by the description of the weir which had been always in use before 1766, or from the partial encroachment which had been then made, but which still left such a passage for the fish over the remaining brushwood weir as made it not material for the plaintiff to assert his right. A rule Nisi was accordingly granted.—*Topping*, *Scarlet*, and *Holroyd* now shewed cause, and argued shortly upon the weight of evidence in favour of the defendant's right to have a weir of stone if he pleased from the alteration made in 1766 so long acquiesced in, and followed up by the completion of the work in 1784. And they also adverted to the contrariety of evidence as to the injury to the plaintiff from the latter alteration—*Cockell*, Sergeant, *Park*, *Wood*, and *Raine* were to have supported the rule.—Lord *Ellenborough*, Chief Justice. It is impossible to sustain this verdict. The right set up by the defendant to have a stone weir is plainly founded upon encroachment. The erection of weirs across rivers was reprobated in the earliest periods of our law. They were considered as public nuisances.

The words of Magna Charta (*a*) are, that "all weirs from henceforth shall be utterly pulled down by Thames and Medway, and through all England," &c. And this was followed up by subsequent acts (*b*), treating them as public nuisances, forbidding the erection of new ones, and the enhancing, straitening, or enlarging of those which had aforetime existed. I remember that the stells erected in the river Eden by the late Lord Lonsdale and the corporation of Carlisle, whereby all the fish were stopped n their passage up the river, were pronounced in this Court, upon a motion for a new trial, to be illegal and a public nuisance. Now here it appears that previous to the erection of this complete stone weir there had always been an escape for the fish through and over the old brushwood weir, in which those in the stream above had a right; and it was not competent for the defendant to debar them of it by making an impervious wall of stone through which the fish could not insinuate themselves, as it is well known they will through a brushwood weir, and over which it is in evidence that the fish could not pass, except in extraordinary times of flood. And however 20 years acquiescence may bind parties whose private rights only are affected; yet the public have an interest in the suppression of public nuisances, though of longer standing. No objection however of this sort can apply to the present case, where the action was commenced within 20 years after the complete extension of the stone weir across the river, by which it is proved that the plaintiff has been injured. Then, however general the words of the ancient deeds may be, they are to be construed, as Lord Coke says, by evidence of the manner in which the thing has been always possessed and used. —*Lawrence*, Justice. The Jury themselves have found the fact, that the plaintiff's fishery is injured by the stone

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(*a*) Ch. 23. (*b*) Vide 12 Ed. 4. c. 7.

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weir, and therefore the verdict is against the evidence: and there is no bar to the action from any length of possession in the defendant.—Per Curiam. Rule absolute.

The Earl of Clanricarde v. Stokes. 7 *East Rep. p.* 516.

Assuming it to be necessary in an action for a penalty by a common informer that the count should refer to the statute giving the remedy as well as to that creating the offence and giving the penalty; yet a count for the penalty on the Stat. 5 Ann. c. 14. stating that the defendant kept a snare to kill game, against the form of the statute in such case made, &c. by reason whereof, and by force of the statute in such case made, &c. an action hath accrued, &c. is sufficient for the last statute mentioned refers to the 5 Ann. c. 14. creating the offence and

In debt to recover the penalty of 5*l.* created by the Stat. 5 Ann. c. 14. the declaration stated that the defendant within six months next before the exhibiting of the plaintiff's bill, to wit, on the 4th of Nov. 1805. at Exton in Hampshire, did keep a snare to kill and destroy game, the said snare being then and there an engine to kill and destroy the game, against the form of the statute in such case made and provided; the said defendant not being in anywise qualified or having any lawful authority so to do: by reason whereof, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of the defendant 5*l.* Plea, Nil debet. After verdict for the plaintiff, it was moved in last Easter term to arrest the judgment, and the rule was now supported by *Jekyll* and *Dampier*, on the ground that the penalty and the remedy by action were given by several different statutes, *viz.* the penalty by Stat. 5 Ann. c. 14. (*a*), made perpetual by Stat. 9 Ann. c. 25. (which so far may be considered for this purpose as one act;) and the remedy by three statutes, first by the Stat. 8 Geo. 1. c. 19. substituting the action (which is to be brought before the end of the next term after the offence,) for the information before justices under the Stat. 5 Ann. and giving half the penalty to the common informer; next, by the Stat. 26 Geo. 2. c. 2. which extends the time for bringing the action to two terms after the offence committed; and lastly, by the Stat. 2 Geo. 3. c. 19. which gives the whole penalty (sought to be recovered in this action) to the informer, and extends the

(*a*) This gave the remedy by conviction before a justice of peace

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time for bringing the action to six months after the offence committed, but without repealing the Statute of the 26 Geo. 2. c. 2: the offence therefore, they contended, ought to have been laid against the statutes, in the plural, and not, as it is here laid, "against the form of the statute." And this objection, it was said, was not aided by the conclusion of the count, "by reason whereof and by force of the statute, &c. an action hath accrued;" for either the statute there mentioned must mean the same statute referred to in the former part of the count, or at any rate it can only refer to one of the three statutes last mentioned; whereas the right of suing for the whole penalty by a common informer must depend upon two at least, the 8 Geo. 1. and 2 Geo. 3. if not also upon the 26 Geo. 2. And the Case of Lee v. Clarke (*a*) was cited, where the same objection (amongst others) was taken and countenanced by the Court; and in which Dingley v. Moore (*b*), and Broughton v. Moore (*c*), were cited, which are full to the present point, as well as what was said by Warburton, J. in Rex v. West (*d*). And they contended that where an offence was created by a statute inflicting a penalty, which did not exist at common law, and an action is afterwards given to a common informer, it is as necessary that the Court should be referred to the statute or statutes giving the remedy, as to the statute creating the offence: for otherwise, if instead of a general reference to "the statute in such case made," the count referred to the Statute 5 Ann. the Court would not see that a right to sue had thereby accrued to the plaintiff: and the Court cannot without such reference intend that an action is given to a common informer; for prima facie the penalty would belong to the crown. —*Burrough* and *Gaselee* shewed cause, and argued

giving the penalty; and the statute lastly mentioned refers to the 2 Geo. 3. c. 19. whereby the whole penalty is given to the common informer, the half only of which had been given to him by an intervening statute. 2 Smith's Rep. 506. S. C.

(*a*) 2 East, 333.
(*b*) Cro. Eliz. 750.
(*c*) Cro. Jac. 142.
(*d*) Owen. 135.

A. D. 1806. that, as the Statute 5 Ann. c 14. alone creates the offence and gives the penalty, the offence is properly laid to be against the form of the statute, according to the authorities mentioned; to which may be added Plowden, 206.; and that, notwithstanding a continuing, or as is said by Warburton, J. in Owen, 335. even a reviving statute; though here the Stat. 9 Ann. c. 25. which perpetuates the former act passed before it expired (*a*). And it makes no difference that the action is given by another statute. It was not necessary for the count to refer at all to the statute which gives the remedy to the common informer; for, being a public statute, the Court are bound to notice it: and it being stated that the action was brought within six months, and the penalty being given to him who sues, the bringing the action shews a sufficient title in the plaintiff. It is only necessary to refer to the statute creating the offence and giving the penalty: all the rest may be rejected as surplusage: and the count might have concluded that "by reason whereof, (without adding 'and by force of the statute,') an action hath accrued," &c. Lutw. 132, 3. 8. 161. 166. 190. 3. 208 221. Lill. Entr. 148. 175. 222. 255. Co. Entr. 159. 161, 2, 3, 4, and 5. But the addition of contra formam statuti, though not necessary, will not hurt, according to Bennet v. Talbois (*a*). But supposing it to be necessary to refer to the statute giving the action, such reference is to be found in the words of the count, "and by force of the statute," &c.; referring to the Stat. 2 Geo. 3. c. 19. s. 5. which must be construed reddendo singula singulis, and gives an action of debt or on the case, &c. and enables the informer to sue for the whole penalty to his own use within six months. It would then stand thus, that the allegation of the offence being committed against the form of the statute would refer to the Stat

(*a*) Vide 2 Hawk. c. 25. s. 117. (*b*) 1 Ld. Ray. 149.

5 Ann. c. 11. which creates the offence and gives the penalty; and the subsequent words, "by reason whereof," would refer to the same statute; and the words, "and by force of the statute, &c. an action hath accrued," &c. would refer to the Statute 2 Geo. 3. c. 19. The Case of Lee v. Clarke did not turn on this point; [*Lawrence*, J. It was not alleged there that he used the snare against the form of the statute.] And this is distinguishable from Dingley v. Moore (*a*), where the information was upon the statute 33 Hen. 8. c. 16. for buying worsted yarn within the county of Norfolk, not being a weaver; &c.; which act was continued by Stat. 1 Ed. 6. c. 6. only in respect of yarn spun out of the rock, but not for other yarn; and therefore the information was quashed, not because it was only laid contra formam statuti, but because it did not shew that it was yarn spun of the rock; for otherwise it was no offence. And Shelton's case for recusancy, there relied on, where the objection prevailed that it was not laid contra formam statutorum, was were the offence was created by the Stat. 1 Eliz. c. 2. and the penalty given by Stat. 23 Eliz. c. 1. against such as refused to go to church against the form of the Stat. 1 Eliz. And Broughton v. Moore (*b*) went on the same distinction. It was asked by Lord *Ellenborough* of the defendant's counsel in the course of the argument, whether they had found any express authority for saying that the count must refer to the statute giving the remedy, as well as to that creating the offence and giving the penalty? To which they answered in the negative; but contended that it was equally necessary upon principle for the reasons before urged. And at the conclusion, the Court, assuming it to be necessary to borrow the aid of two statutes in order to sustain the action, *viz.* the Stat. 5 Ann. c. 14. creating the offence and A. D. 1806.

(*a*) Cro. Eliz. 750. (*b*) Cro. Jac. 142.

A. D. 1806. giving the penalty, (on which statute alone the criminal part of the charge rested;) and the Stat. 2 Geo. 3. c. 19. giving the remedy; (which latter, they thought, alone gave the remedy, without reference either to the Stat. 8 Geo. 1. or the Stat. 26 Geo. 2. inasmuch as it gave the whole penalty to the informer, and not merely the other half in addition to the one half before given by the Stat. 8 Geo. 1.) yet observed, that here there was a sufficient reference in the count to the two first-mentioned statutes: and that if, instead of the general form of declaring by reference to "the statute in such case made," &c. the particular statute were referred to by name, the count would run thus, that the defendant committed the offence (stating it) against the form of the Statute 5 Ann. &c.; by reason whereof, and by force of the Stat. 2 Geo. 3. an action hath accrued, &c. There was therefore no ground for the objection in arrest of judgment. **Rule discharged.**

Still v. Walls and Harris. 7 East Rep. p. 533.

The Statute 13 Geo. 3. c. 80. gives a penalty in case of killing game on a Sunday, and directs that it shall be forthwith paid on conviction; and that in case of neglect or refusal to pay or give security for the payment of it the justice shall by warrant under his hand and seal cause the same to be levied by

In an action for an assault and false imprisonment, to which the defendant pleaded the general issue, it appeared in evidence for the plaintiff before *Heath*, J. at the last Maidstone assizes, that the defendant Walls, as headborough of Cowdend in the county of Kent, and Harris as his assistant, arrested the plaintiff some day in January, 1805, between 3 and 4 o'clock in the afternoon, and detained him in their custody till the evening of the next day, when they carried him before Mr. Allnutt, a justice of peace for that county, who then discharged him. A demand of the copy of the warrant by which the plaintiff had been apprehended was then proved by his attorney, but no copy was given. On the other hand Mr. Allnutt, the magistrate deposed, that an information was laid before him by one Bellenden against the plaintiff for killing game on a Sunday,

against the Stat. 13 Geo. 3. c. 80. s. 6. (*a*), founded on the prior Stat. 10 Geo. 3. c. 19. s. 2. (which information was read in evidence). That he accordingly summoned the plaintiff, who appeared before him, and convicted him of the penalty specified in the act; which the plaintiff declaring himself unable to pay, the magistrate issued a warrant of distress returnable the next day, and verbally directed the defendants to detain the plaintiff in custody until it could be known whether a sufficient distress could be levied on the plaintiff's goods. The plaintiff however paid the penalty the next day, and was then discharged. It was objected that the magistrate was not authorized by the statute to commit the plaintiff by parol: if he were so authorized, a nonsuit was to be entered; otherwise a verdict for 40*s.* given by the Jury was to stand.—*Garrow* and *Espinasse* now shewed cause against a rule for entering a

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distress and sale of the offender's goods; and that it shall be lawful for such justice to order such offender to be detained in custody until return may conveniently be made to such warrant of distress, unless the party convicted shall give security for his appearance, &c. Held that such order to detain in custody until the return of the warrant of distress may be by parol.

(*a*) The act of the 10 Geo. 3. directs that "in case such penalty shall not be forthwith paid, such justice shall, by warrant under his hand and seal, cause the same to be levied by distress and sale of the offender's goods, &c. And in case no sufficient distress can be had such justice shall commit the offender to the common gaol," &c. But that act is repealed by the 13 Geo. 3. c. 80. s. 5. in all its provisions. But by s. 6. of the latter statute, any person killing game, on a Sunday, "being convicted thereof in the manner and form prescribed by this act, shall be subjected to the like forfeitures and penalties as are hereinbefore enacted to be inflicted for other offences against this act" The 1st section relates only to so much of the Stat. 10 Geo. 3 as provides against destroying game in the night, for which it inflicts certain penalties on conviction for a first, second, and third offence. Sect. 2. gives a form of conviction; s. 3. directs the clerk of the peace to give a copy of the conviction; and s. 4. enacts, "that the pecuniary penalties hereby to be incurred and made payable upon any conviction, &c. shall be forthwith paid by the person convicted, &c. And in case such person shall refuse or neglect to pay the same, or to give security for the payment thereof, such justice, by warrant under his hand and seal, cause the same to be levied by distress and sale of the offender's goods," &c. And then it proceeds, "and it shall and may be lawful for such justice to order such offender to be detained in safe custody until return may conveniently be had and made to such warrant of distress, unless the party so convicted shall give sufficient security for his appearance, &c. But, if upon such return no sufficient distress can be had, then and in such case the said justice shall and may commit such offender," &c.

A. D. 1806. nonsuit, and referred to the rule laid down by Hawkins (*a*), that every commitment must be in writing under the hand and seal of the person by whom it is made, and expressing his office or authority, and the time and place at which it is made, and must be directed to the gaoler or keeper of the prison. And contended that the order of the justices, spoken of in the Stat. 13 Geo. 3. c. 80. s. 4. to detain the offender in custody till the term of the warrant of distress, must be understood of an order of commitment in the usual legal form, namely, an order in writing, &c. That this was confirmed by the general provisions of the Stat. 24 Geo. 2. c. 44. whereby no action shall be brought against any constable or other officer acting in obedience to a justice's warrant until demand and refusal for six days of the perusal, and of a copy of the warrant; the production of which warrant is a justification to the officer: the object of which regulation is to give some certain remedy against the magistrate himself, who is thereby made responsible for the legality of the arrest. But if a commitment by parol may be justified, great mischief and uncertainty will be introduced, and the checks intended by the legislature in favour of the liberty of the subject will be eluded. They also suggested that the proper course would have been for the magistrate to have made out his warrant in the alternative; i. e. to distrain for the penalty, if a sufficient distress could be found; or otherwise, to commit the party.—*Bayley*, Serg. and *Taddy* were to have supported the rule; but the Court were all satisfied that under the act of the 13 Geo. 3 c. 80. the magistrate might legally authorize by parol the defendants to detain the plaintiff in custody till the return of the warrant of distress. They also said, that the commitments spoken of by Hawkins in the passage cited meant commitments to the

(*a*) 2 Hawk. ch. 16. s. 13.

custody of sheriffs, gaolers, &c. For it never could be doubted but that a magistrate might by parol order an offender to be detained in custody until he could make out his warrant of commitment: and this Court were in the constant habit of directing commitments verbally, which were afterwards recorded. So a magistrate in the case of a breach of the peace within his view might instantly order the offender to be taken into custody: otherwise in the case of a sudden affray, all the powers of the king's commission might be in abeyance for want of pen, ink, and paper. That there was nothing in the act requiring the authority to distrain, and to commit if there were no sufficient distress, to be by the same warrant: and the Lord Chief Justice thought that, according to the wording of the act, the authority was rather more properly executed by separate warrants. Rule absolute for entertaining a nonsuit. A. D. 1806.

Townsend, Clerk, v. Wathen. 9 *East Rep. p.* 277. A. D. 1808.

The plaintiff declared in case, and stated that on the 1st of April, 1800, and on divers other days, &c. the defendant, wrongfully intending to catch, maim, and destroy the plaintiff's dogs at B. &c. placed and procured to be placed divers traps, &c. in and about a certain wood called Catteswood, there situate, and near to divers public highways and footways, and also near to divers grounds of the plaintiff, and of other persons there situate, and procured to be placed pieces of flesh and other strong smelling things in and about the said traps, &c. and continued the said traps and pieces of flesh, &c. for a long time, &c.; and continued the same there in the day time, &c. and also on the several days and times procured to be trailed pieces of flesh and other strong smelling things along the ground about the said traps, &c. so laid as aforesaid, and from the said highways, footways, and grounds, towards and into the

If a man place dangerous traps, baited with flesh, in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbour's premises, must probably be attracted by their instinct into the traps; and in consequence of such act his

A. D. 1808.

neighbour's dogs be so attracted, and thereby injured, an action on the case lies.

traps, &c. By reason of which premises on the several days, &c. at B. aforesaid, divers dogs of the plaintiff, then and there lawfully going along the said public ways, &c. and others of the plaintiff's dogs, then and there lawfully being in his said grounds, and others of them in the said grounds of other persons, were by the scent of the said flesh and other things so placed and trailed, enticed from the said highways, footways, and grounds respectively, to the said traps, &c. and were caught therein, and greatly wounded, &c. After a verdict for the plaintiff at the trial at Gloucester before *Macdonald*, C. B. it was objected by *Williams*, Serg. on a motion for a new trial, that there was no evidence of any malicious intention against the plaintiff's dogs, or that the traps were set for the purpose of catching dogs in general; and that this was necessary to sustain the action; the traps having been set in the defendant's own ground, on which the plaintiff's dogs must have been trespassing at the time they were taken; and the defendant having a right to set the traps there. And a rule nisi was granted for setting aside the verdict as against evidence: but the Court refused another rule which was also prayed, for arresting the judgment: Lord *Ellenborough*, C. J. saying that the count having charged that the traps were wrongfully set for the purpose of catching the plaintiff's dogs, though set in the defendant's own ground, no doubt that the action was maintainable. Upon reading the Chief Baron's report of the evidence, in this term, it appeared, that the plaintiff and defendant lived near each other in the country. The defendant was the owner of a wood called Catteswood, about a mile in length, one end of which adjoined the plaintiff's grounds, within 150 yards of his dwelling house where he had resided for about two years last past. Some time before the plaintiff went to reside there, the defendant had procured half a dozen

traps to be made much larger and stronger than those usually set for catching vermin, which he stated at the time to be intended for foxes, or any thing that came in the way; and in fact a sheep had been caught in one, and a deer of the defendant's own in another of them. Some of these traps were set in Catteswood by day and by night, and baited sometimes with fresh, sometimes with stinking, flesh. The wood was intersected by several public highways and paths; but the traps were so set near blind tracks in the wood made by persons or by sheep. The defendant's game-keeper also trailed sheeps' paunches, rubbed with anise-seed, by a string, at some distance round about the traps, (but this did not appear to have been done from the highways, or after the plaintiff came to reside at his house,) in order to draw animals to them: and the defendant allowed 2*s.* 6*d.* for every fox or badger, and 1*s.* for every dog which was killed. In one year seven dogs had been taken and killed, which the defendant was proved to have known and approved of. Catteswood was not a preserve for game: nor did the whole of it belong to the defendant; nor was any board put up there to warn persons of the traps: and the witnesses stated their opinion, that the traps could not safely be so baited and scented in the day-time when dogs were commonly passing with their owners through the wood; and that a dog, on account of the scent, could not pass along the public paths without danger of being drawn by his instinct to the traps. All this, which had passed before the plaintiff came to reside at his house, was continued afterwards; and at different times within the last two years several of his dogs had been caught in the traps which were baited with flesh; by which some of them had been much injured, and others entirely spoiled: and some of the traps were set in the wood so near to the plaintiff's house, that the baiting and the anise-seed

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the act he does. And therefore when the defendant caused traps scented with the strongest meats to be placed so near to the plaintiff's house as to influence the instinct of those animals and draw them irresistibly to their destruction, he must be considered as contemplating this probable consequence of his act. That which might be taken as general evidence of malice against all dogs, coming accidentally within the sphere of the attraction which he had placed there, must surely be evidence of it against those in particular which were placed nearest to the source of attraction and within the constant influence of it. What difference is there in reason between drawing the animal into the trap by means of his instinct which he cannot resist, and putting him there by manual force? If a man knowingly keep a dog accustomed to bite, and any person coming by chance in his way be bitten, an action lies against the owner, though he had no malice against the particular individual. Here there is evidence that the defendant's purpose in setting the traps was to catch dogs in general, as well as vermin; for he afterwards recompensed his servant for dogs taken in the traps. The rule, therefore, omnis ratihabitio retro trahitur et mandato æquiparatur, applies to this case. Without, therefore, considering what had happened before the plaintiff came to his residence in the defendant's neighbourhood; when he did come, he came to a place where the mischief existed and continued to operate within the sphere where he might lawfully have his dogs, and which, in fact, did afterwards operate upon them to the plaintiff's prejudice. —*Grose*, J. I think there is evidence that the defendant meant to set the traps for dogs as well as other animals; because when dogs were caught in them, he rewarded his game-keeper at the rate of so much a head. This therefore was fit evidence to be left to the Jury

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A. D. 1808 of his intention to catch the plaintiff's dogs as well as others. It is true that the traps were set in his own ground; but a man must not set traps of this dangerous description in a situation to invite his neighbour's dogs, and as it were to compel them by their instinct to come into the traps.—*Lawrence*, J. There is no evidence of the defendant's having trailed round the traps while the plaintiff was residing at his house near the wood; but there is evidence of the traps having been baited after he came to reside there; and this, so near to the plaintiff's house as to draw his dogs to them by their scent. The very object of baiting traps is to draw animals towards them by their instinct from the course they are pursuing: when therefore the defendant placed his traps so baited in a situation so near to the plaintiff's house, as that his dogs kept there might scent the bait, he must be taken to have contemplated the natural consequence. He did, therefore, in the words of the declaration, entice the plaintiff's dogs, &c.—*Le Blanc*, J. The only question now is whether the evidence sustains the verdict. If a man will put traps baited in places so near the highway as that dogs passing along there will probably be attracted by the scent into the traps; that is evidence that he does the act for the purpose of catching any dogs that may happen to pass along there. When the evidence is, that before the plaintiff came to reside at his house, the defendant's game-keeper used to trail meat rubbed with aniseseed round about the traps; it is plain, that the intent was to attract all animals whose instinct was governed by the scent into the traps. Then, after the plaintiff came to reside at his house, the placing these baited traps so near to the plaintiff's premises where he kept his dogs as to attract them by the scent, must be evidence to go to the Jury, that the traps were placed there for that purpose. Rule discharged.

The King v. Pearse. 9 *East's Rep. p.* 358. A.D. 1808.

Abbott moved for a certiorari to bring before the Court a conviction on the Stat. 5 Ann. c. 14. s. 4. drawn up according to the precedent in Burn's Justice, followed in the Case of the King v. Thompson (*a*), though disapproved by all the Court, wherein the Deposition of the witness to the fact was stated in the words of the statute; namely, that the defendant on the day and place mentioned, "did keep and use a certain engine called a gun to kill and destroy the game;" without setting forth the particular evidence of the fact. The same form had been adopted before in Rex v. Hartley (*b*), and was afterwards pursued in Rex v. Lovet (*c*); but in the latter case the Court greatly disapproved of it; and granted a rule calling on the convicting magistrate to shew cause why a criminal information should not go against him for not stating all the evidence given; and after hearing the affidavits on both sides, the rule was finally discharged only on the ground that the magistrate had not acted corruptly, and might have been misled by the precedent in Rex v. Thompson: but they expressed their opinion in strong terms, that it was the duty of magistrates in all cases to state the whole of the evidence, and not merely the result of it. And in the King v. Clarke (*d*), where the particular evidence of the fact of killing the game was set forth, the Court expressed their approbation of it, and recommended it as a precedent to be followed in future; and expressed themselves much dissatisfied with the general mode of stating the evidence, in the terms of the act of parliament, which had been practised in these cases. He therefore moved for the certiorari in this case, with a view to settle the question in future. But by Lord *Ellenborough*, C. J. all the arguments against this form of conviction were discussed and considered in the

Though it be proper for a magistrate in drawing up a conviction on the Stat. 5 Ann. c. 14. to state the particular evidence of the fact on which his judgment is founded, and not merely the legal effect of it in the words of the statute, yet a conviction in the latter form is valid in law: but the magistrate subjects himself to an information if he endeavour to shelter himself from detection by mis-stating such legal result when the evidence would not warrant it.

(*a*) 2 Term Rep. 18.
(*b*) Cald. 175.
(*c*) 7 Term Rep. 152.
(*d*) 8 Term Rep. 220

A. D. 1809. King v. Thompson; and though the Court disapproved of it, still they held themselves bound by former precedents to support it. The point therefore having been decided again and again, we cannot have it discussed any more.—*Le Blanc*, J. If a magistrate endeavour to shelter himself from detection by merely stating the fact of the offence in the terms of the act of parliament, as if it were the legal effect of the evidence, when the evidence itself would not warrant the conclusion, he subjects himself to a criminal information, upon a proper case laid before the Court.—Per Curiam. The writ denied.

Warneford v. Kendall. 10 *East's Rep. p.* 19.

The possession of game by a servant employed to detect poachers, who took it from a hare killed by strangers on the manor, in order to carry it to the lord, is not a possession within the penalty of the Game Laws.

The plaintiff declared in debt for the 5*l.* penalty given by Stat. 5 Ann. c. 14. against the defendant for exposing to sale a hare, not being qualified in his own right to kill game, nor entitled thereto under any person so qualified: against the form of the statute. At the trial it was proved that the plaintiff went out coursing, and killed a hare on Shipston manor, when the defendant, who was employed as a carpenter and woodman by Mr. Earl, the lord of the manor, and had directions from him to detect poachers, came up, and took the hare from the dog, and carried it away, notwithstanding the plaintiff claimed it, to Mr. Earl's steward, according to his instructions.—*Lawrence*, J. before whom the cause was tried, thought that this was not a case within the statute; but upon the authority of Molton v. Cheeseley, 1 Esp. N. P. Cas. 123., with which he was pressed by the plaintiff's counsel, he suffered a verdict to be taken for the plaintiff, with leave to the defendant to move to set aside the verdict, and enter a nonsuit, if the plaintiff were not entitled to recover. And a rule nisi having been obtained for that purpose, upon the application of *Park* and *Littledale*;

—*J. Williams* now shewed cause, and contended that the penalty was incurred by the defendant, within the express words of the Statute 9 Ann. c. 25. s. 2., which enacts that, "if any hare, &c. shall be found in the possession of any person whatsoever, not qualified in his own right to kill game, or being entitled thereto under some person so qualified, the same shall be taken to be an exposing to sale thereof within the true intent and meaning of the Stat. 5 Ann." For the defendant was not qualified in his own right, and the steward of the manor, who at most could have but a delegated authority from his master, could not transfer such authority to another. And as to the defendant's possession of the game being bona fide and without any intention to offend against the Game Laws, that cannot vary the case; as was held in Calcraft v. Gibbs(*a*); where, though the defendant had acted bona fide as game-keeper under a deputation to one who claimed to be lord of the manor, yet the claimant's title failing, the defendant was deemed liable to the penalty. So the possession of naval stores, however innocently, cannot be justified except in one or other of the ways protected by the act(*b*).—Lord *Ellenborough*, C. J. The question is, Whether the possession of the defendant were such as to constitute an offence, and subject him to the penalty under the statute? He did not claim the hare as his property, nor acquire the possession of it for himself, but for his master, on whose manor it was taken: and if this be an offence, no case can be stated in which an unqualified person can innocently come in contact with game. It may as well be said that if a qualified man returning home with a bag of game were to fall from his horse, another could not lawfully take up the bag

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(*a*) 5 Term Rep. 19.

(*b*) 9 and 10 W. 3. c. 41. and vide Stat. 39 and 40 G. 3. c. 89., which recites the intervening statutes; but see the case before Foster, J. in the Appendix to his Treatise on the Crown Law, 439. edit. of 1792. and 2 East's P. C. 765.

A. D. 1808. in order to assist the owner: or that if a person seized an offender who had naval stores unlawfully in his possession, and took them away in order to bring them before a magistrate, that would be an unlawful possession against the acts of parliament made for protecting the king's stores. The Case of Molton v. Cheeseley must have been imperfectly stated(*a*).—*Grose*, *Le Blanc*, and *Bayley*, Justices, assented; and the former observed that the possession of the game by the defendant was rather for the purpose of protecting the game, than in breach of the laws for preserving it. Rule absolute.

(*a*) The fact proved there was, that a pheasant had been killed by accident by the defendant's dog; and the defendant had afterwards carried it away. Two penalties were sought to be recovered, one for having the pheasant in his possession, not being qualified, the other for keeping a dog to kill game. Mr. Justice Buller is said to have ruled that the plaintiff could go for one penalty only, "for that both offences being by the same act, the plaintiff could recover but one penalty under the same statute." The wording being equivocal, it was considered at first as if by the word act was to be understood statute; which it was agreed on all hands could not have been ruled by the learned judge; who probably said that two penalties could not be recovered under this statute for the same act done by the defendant.

Janson v. Brown. 1 *Campbell's Rep. p.* 41.

If defendant justifies shooting a dog, because the dog was worrying his fowl, and could not otherwise be prevented, he

Trespass for shooting the plaintiff's dog. Pleas, 1. not guilty; and 2. a justification, that the dog was worrying and attempting to kill a fowl of the defendant's, and could not otherwise be prevented from so doing(*b*). Replication to the last plea, de injuria sua propria absque tali causa. The case being made out on the part of the plaintiff, *Garrow* for the defendant

(*b*) Wright v. Ramscot, 1 Saund. 84. is a strong authority that such an averment is necessary in a plea of this kind; although in Keek v. Halstead, 2 Lutw. 1494. a justification omitting it was held to be good. It seems, that if the transaction had taken place in the defendant's poultry-yard, it would have been enough to have stated in the plea, that the dog was pursuing the fowl; as it is not necessary to allege that the defendant could not otherwise prevent the dog from killing conies in a warren; but it is sufficient to state, that the dog was in the warren pursuing the conies there, and therefore he killed him. Wadhurst v. Damme, Cro. Jac. 44. And it is the same, if a dog runs after deer in a park. Barrington v. Summers, 3 Lev. 28. 1 Sid. 336. Com. Dig. tit. Pleader. (3 M. 33.)

said, he should prove that just before the dog was shot, being accustomed to chase the defendant's poultry, he was worrying the fowl in question, and that he had not dropped it from his mouth above an instant when the piece was fired. But Lord *Ellenborough* said, this would not make out the justification; to which it was necessary that when the dog was shot, he should have been in the very act of killing the fowl, and could not be prevented from effecting his purpose by any other means. Verdict for the plaintiff, with 1*s*. damages.—*Park* and *Richardson* for the plaintiff. *Garrow* and *Manley* for the defendant.

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must prove that the dog was in the act of worrying the fowl at the very moment he shot him.

Rogers and others v. Allen. 1 *Campbell's Rep. p.* 309.

Trespass for breaking and entering the several oyster fishery of the plaintiffs, in a certain river called Burnham river; and in divers parts of the said fishery, to wit, &c. [naming four places in Burnham river] fishing and dredging for oysters, &c. A second count charged the defendant with fishing and dredging for oysters in divers parts of the fishery, between a certain place in the river called Clayclods, and a certain other place in the said river called Raysand. The last count was general, stating that the defendant broke and entered a certain other several oyster fishery, and also a certain free fishery of the plaintiffs. Pleas, 1. the general issue; 2. after averring the different fisheries mentioned in the declaration to be the same, that the place in which, &c. is a navigable river, and arm of the sea, in which all the king's subjects have a right to fish and dredge for oysters. The plaintiffs in their replication to the last plea prescribed (*a*) under the persons seised in fee of the manor of Burnham, for "the sole, several, and exclusive liberty and privilege of fishing for, taking, and carrying away all oysters and oyster spats in and upon the said several parts of

To prove a prescriptive right of fishery as appurtenant to a manor, old licences on the court rolls, granted by the lords of the manor, in consideration of certain rents, to fish in the locus in quo are evidence, without proof of the rents being paid, if it appears that such rents have been paid in modern times, or that the lords of the manor have exercised other acts of ownership over the fishery.

(*a*) Mayor of

A. D. 1806. Oxford v. Richardson, 4 T. R. 437. 2 H. Bl. 182.

the said fishery, in which, &c. in the said declaration particularly mentioned, as to the said manor belonging and appertaining." Rejoinder, traversing this prescription, and issue thereupon. An inquisitio post mortem, and several other documents from the Tower of London being put in, to shew that in very early times there had been a fishery at the mouth of the Burnham river held by the Fitzwalters, the ancestors of the family now in possession, as parcel of the manor of Burnham; and three judgments being proved, which had been obtained in the reigns of Charles I. and Charles II. by the lords of the manor of Burnham, in actions for breaking and entering their several fishery in the Burnham river (*a*): in further support of the prescriptive right, certain licences were offered in evidence, which appeared on the court rolls of the manor, and bore date from the year 1661 downwards to the end of the 17th century; whereby the lords of manor in consideration of certain rents, had granted the liberty of fishing and dredging for oysters in their several fishery in the Burnham river, reserving to themselves the exclusive right to all floating fish therein.—The defendant's counsel objected to the admissibility of the licences as evidence, unless it should appear by bailiff's accounts, or otherwise, that rent had actually been paid under them; urging that if they could be received without this, it would be easy to manufacture evidence, which now, or at some future time, might establish an unfounded claim, to the injury of some other individual, or to the exclusion of the public. —*Heath*, J. said, he could not distinguish these licences from old leases, which were always received in evidence, in favour of those claiming under the lessors. Nor did he think it necessary to prove payment under the licences, as they were of such an ancient date that it could not reasonably be supposed that evidence of

(*a*) Reed v. Jackson, 1 East. 355.

such payments was still preserved. However, to give any weight to these licences, it must be shewn that in later times payments had been made under licences of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in (*a*). After the licences, a regular set of leases, or agreements for leases, of the oyster fishery during the whole of the last century were produced, and it appeared that for the last forty years rent had regularly been paid under them. It was likewise proved, that as far back as could be remembered by the oldest witnesses, when strangers came to dredge for oysters within the limits of the fishery, they had constantly been driven off by a watchman kept for that purpose. The plaintiff's case being closed, several grounds of defence were opposed to it. In the first place it was strenuously contended that a grant from the crown ought to have been produced, and that a several fishery in a navigable river could not pass as appurtenant to a manor.—But *Heath*, J. said, there was no authority for this supposition, and that the fishery might well pass as an appurtenance of the manor (*b*).

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A prescriptive right to a several fishery in a navigable river may pass as appurtenant to a manor.

A right of fishery is divisible, and may be lost

(*a*) Vide Roe ex d. Bebbee v. Parker, 5 T. R. 26.—Barry v. Bebbington, 4 T. R. 514. Stead v. Heaton, ib. 669.—Outram v. Morewood, 5 T. R. 121.

(*b*) A prescription for common of fishery as appurtenant to certain ancient tenements is bad; since all the king's subjects of common right may fish in the sea, and a man might as well prescribe, that he and all those whose estate he has, have a right to travel on the king's highway. Ward v. Cresswell, Willes, 265. 16 Vin. Abr. tit. Piscary. (B). But it has been decided that there may be a prescriptive right in a subject to a several fishery in an arm of the sea. Mayor of Orford v. Richardson, 4 T. R. 439. 2 H. Bl. 182. S. C. And though prima facie every subject has a right to take fish found upon the seashore between high and low water mark, such general right may be abridged by the existence of an exclusive right in some individual. Bagott v. Orr, 2 Bos. and Pul. 472.—As a right to a several fishery in an arm of the sea is raised by grant, and not like the royal franchise of deodands and felons goods, by matter of record, it may, according to the common rule, be prescribed for in a que estate. Co. Litt. 114. 2 Blac. Com. 265. Indeed it cannot be expressly claimed under an existing grant from the crown; as a grant to support it must be as old as the reign of Henry II. and therefore beyond time of legal memory; for by the second and third charters of Henry III. all the rivers fenced in from the beginning of the reign of Richard I. were directed to be laid open, 2 Blac. Com. 39.

A. D. 1803. The defendant afterwards gave in evidence that all who chose had been accustomed to fish in the Burnham river for all sorts of floating fish, without any interruption. It was therefore contended on his part, that this completely disproved the exclusive right claimed by the lord of the manor of Burnham. A fishery must be entire; and it appeared from the licences and leases that the lords of the manor set up exactly the same pretensions to the floating fish as they did to the ground fish. Now as it had been clearly proved that it was lawful for all the king's subjects to catch the former, so might they lawfully dredge for the latter. This was like the right of free warren. If that were claimed in a particular place; and it appeared that hares and partridges (though not pheasants) had always been killed there in the same manner as over the rest of the country, it was impossible that the claim could be sustained.—*Heath*, J. A right of fishery and a right of free warren are not at all like each other. The one is divisible, the other is not. Part of a fishery may be abandoned, and another part of more value may be preserved. The public may be entitled to catch floating fish in the river Burnham; but it by no means follows that they are justified in dredging for oysters, which may still remain private property. It was next contended, that the plaintiffs must be nonsuited on account of the variance between the evidence and the pleadings. It appeared that for certain oysters laying on one of the places mentioned in the declaration, the plaintiffs paid rent to the Earl of Winchilsea, and there was evidence of oysters being taken under a claim of right from another of these places by the occupier of the adjoining land. On the supposition, therefore, that the exclusive right of the lords of the manor of Burnham to the oysters in the two places last alluded to was negatived, it was insisted that the prescription, on which issue was joined, had not been

as to part, and preserved as to part. Therefore an exclusive right to dredge for oysters in a navigable river may subsist as appurtenant to a manor, although it be lawful for all the king's subjects to catch floating fish therein.

In trespass for breaking and entering a several fishery, if the plaintiff prescribes for the sole and exclusive right of fishing over four places in a navigable river, upon which right issue is joined, the prescription must be

been made out as laid. The replication prescribed for "the sole and exclusive liberty and privilege of fishing for, taking and carrying away all oysters in and upon the said several parts of the said fishery in the said declaration particularly mentioned." But the part for which rent was paid to Lord Winchilsea, and the part from which oysters had been taken by the occupier of the adjoining ground, were particularly named in the first count of the declaration, and were comprehended within the limits mentioned in the second. As to these the lord of the manor had no exclusive right, and therefore the prescription failed. The plaintiffs had prescribed too largely; and if they were still to have a verdict and judgment, the consequence would be, that this record would afterwards be evidence of a right which had been expressly disproved in the course of the trial. —*Heath*, J. was of opinion, that although the prescription was more extensive than the evidence would establish, this was immaterial, unless the trespasses had been committed in the excepted places; and the plaintiffs had a verdict: but the Court of King's Bench being afterwards moved to set aside the verdict on account of a misdirection of the Judge upon this point, held that the prescription laid in the replication was negatived by the evidence, and ordered a new trial(*a*).

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proved as extensively as it is laid; and if the right is shewn to exist over three of these places, but not the fourth, this is a fatal variance, notwithstanding that the trespasses complained of were committed in a part of the river where the sole and exclusive right of fishery prescribed is proved to exist.

(*a*) A party prescribing does not fail, although the prescriptive right is found to be more ample than was laid. As where the prescription was to tether horses in a particular place ab et post festum Pent. annuatim, and the verdict found that they had used to do so in vigil. Pentecostes, in festo Pentecostes, die Lunæ in septimana Pentecostes, aut postea ad suum libitum annuatim; this finding, though larger than the prescription laid, was adjudged well to support it. Johnson v. Throughgood, Hob. 64. So where the prescription was for common for one hundred sheep, and found for one hundred sheep and six cows, it was held good. Bushwood v. Bond, Cro. Eliz. 722. Bul. N. P. 59.—But it is essentially necessary to prove the prescriptive right to exist to the full extent in which it is claimed. In Rotheram and Green, Noy. 67. which was an action of trespass, the defendant justified under a prescriptive right of common on 500 acres; and it being found by the verdict, that his ancestors had released the right in 5 of the acres, it was held that the defendant had failed in his prescription. In Conyers and Jackson, Clyt. 19. it is said that a man having an acre of freehold in a field on which there is a right of common cannot prescribe for common in the whole field, because that would extend the prescription to

A. D. 1653. —*Shepherd*, *Best*, *Onslow*, Sergeants, and *Trower*, for the plaintiffs.—*Garrow*, *Marryat*, and *Pooley* for the defendant.

[illegible] and. Therefore where a man has land in a common field, in prescription for a right of common over it he is obliged to except his own land. Sir Miles Corbet's Case, 7 Co. 5. Beckman and Thorns, Freem. 211. In Price and Hewer v. Bull, N. P. C. Wood, C. B. held that if the plaintiff, in replevin for taking cattle, to an avowry for damage feasant, prescribe for common for all commonable cattle, evidence of a right of common for sheep and horses only will not maintain the issue; although it be laid a several common, and laid prescribed for common for any particular sort of cattle, it would have been good. And in the late Case of Kingwell v. Bull, 9 East. 155 it being stated as a custom in a manor, that the land immemorially until a division of a certain tenement into moieties had a heriot, and since the division had a heriot for each moiety; it was held that the whole being stated as one custom, it was disproved by shewing the division to have taken place within time of memory. —The Case of Cowlin v. Williams, Willes, 238. seems contrary to the rule that prescriptions are entire and can neither be split by those who claim them, nor by the opposite party. There the defendant prescribed for a duty, and right to distrain for it, and it was held sufficient to traverse either of them; Denison, J. says, "Suppose a man claims a right to common per cause de vicinage in A. and B. it was never doubted but that a traverse of the right in A. would be sufficient." However, in Morewood and Wood, 4 T. R. 157. which was trespass for entering S. common, the defendant pleaded that S. common and S. green were open to each other, and prescribed for a right in both the common and the green. The replication traversed the right in the common only, and the rejoinder tendered issue on the right in the common and the green. To this rejoinder the plaintiff demurred on the ground that the right in the green was immaterial and irrelevant: but it was held that the prescription being entire, though it was pleaded more largely than necessary, the rejoinder was proper; and that as every prescription was founded on a grant, one could not be partially traversed any more than the other.

Spurrier v. *Vale*. 1 *Campbell's Rep. p.* 457.

Bodies corporate, who are lords of manors, are not prevented by Statute 22 Hen. 8. c. 14. from appointing unqualified persons their game keepers. A deputation to a game-keeper, who is neither himself qualified to kill game, nor

This was an action on the Statute of Anne, for keeping and using a gun for the destruction of game, without being qualified: and it was clearly proved that the defendant, who acted as coachman and gardener to a Mr. Hippuff, had, during the last season, shot over the manor of Birchanger, in the county of Essex. On the part of the defendant, a deputation was given in evidence, under the seal of the Society of New College, Oxford, who are lords of the manor of Birchanger, appointing him their game-keeper, "with full power to kill any hare, pheasant, &c. in and upon their said manor," but without saying "for their sole

use and benefit." The plaintiff's counsel objected to the deputation as being invalid under Stat. 3 *Geo.* 1. c. 11. § 1. whereby it is enacted, "that no lord of a manor shall make any person to be a game-keeper, with power to kill game, unless such person be qualified by the laws of this realm so to do; or unless such person be truly and properly a servant to the said lord; or be immediately employed and appointed to take and kill the game for the sole use of the said lord, and not otherwise." Here the defendant Vale did not himself pretend to be qualified; he was truly and properly a servant to Mr. Hippuff, not to New College, Oxford; and he was not employed to kill game for the use of that learned body, but of the master whom he served. Indeed, it might be questioned, whether under this statute, colleges and other corporations could appoint any person a game-keeper, unless he was himself qualified to kill game.—Sir *Archibald M'Donald*, C. B.—I have recently had occasion to look attentively into this statute; and I am clearly of opinion, that it does not exclude colleges and corporations from appointing such persons as they think fit game-keepers for the manors of which they may happen to be lords. The statute does not require the person appointed to be a menial servant to the lord, but only truly and properly a servant. In this case, it is not necessary that the defendant should be appointed, on the face of the deputation, to kill game for the sole use of the lords of the manor of Birchanger. It will be presumed that he was so, until the contrary is shewn on the other side. In a penal action, it would be too much to presume that the defendant killed game contrary to law, without evidence of that fact. Nor should I think it sufficient to vitiate the deputation, to prove that in some instances he had sold or disposed of the game he killed, to others besides the lords of the manor of Birchanger. The de-

A. D. 1808.

is a servant to the lord of the manor, need not state on the face of it that he is appointed to kill game for the use of the lord; and it will be presumed, that whatever game he kills is for the lord's use, till the contrary is proved.

A. D. 1805. fendant had a verdict, which the Court of K. B. (absente Lord *Ellenborough*, C. J.) afterwards refused to set aside; being of opinion, that the presumption of law was as had been stated by the Chief Baron at nisi prius.—*Garrow* and *Marryat* for the plaintiff.—*Shepherd*, Sergeant, for the defendant.

In Exeter v. Carter, 2 Wils. 137, it was held, that a person was properly qualified to receive a deputation from the lord of a manor to be a game-keeper, although he was neither a qualified person nor a menial servant to the lord of the manor. And now by Stat. 48 Geo. III. c. 93, it is enacted, "that it shall be lawful for any lord or lady of any manor, to appoint and depute any person whatever, whether acting as a game keeper to any other person or not, or whether retained and paid for as the main servant of any other person or not, or whether a qualified person or not, to be a game keeper to any such manor, with authority to such person, as game-keeper, to kill game within the same, for his own use, or for the use of any other person or persons whatever, to be specified in such appointment or deputation, whether qualified or not."

A. D. 1809.

In debt for a penalty, under the Game Laws, if the defendant shew a deputation as game-keeper of the manor from the lord, it may be presumed, if nothing appear to the contrary, that the game killed by him there was for the use of the lord under the Stat. 3 G. 1. c. 11

1 Campbell's Cases N. P. 457. S. C.

Spurrier v. Fale. 10 *East's Rep. p.* 413.

In debt for the penalty of 5*l.* given by the Stat. 3 G. 1. c. 11. and 5 and 9 Ann. for using a gun and dog for killing game, it was proved at the trial that the defendant shot a pheasant on the 1st of October 1807, in Birchanger manor; that he acted as a gardener, and lived in a house belonging to Mrs. Hiphuff. On the part of the defendant a regular deputation was proved from New College in Oxford, dated 28th of March, 1805, and under their seal, appointing him their game-keeper for Birchanger manor, in the usual form, to kill game for their use. In answer to which it was objected, on the part of the plaintiff, that the defendant was not, according to the requisition of the statute, "truly and properly a servant of the lord of the manor." But the Ld. Chief Baron, before whom the cause was tried in Essex, overruled the objection; considering that if the words "truly and properly a servant" were to be construed to mean "domestic servant," corporations or individual lords of manors, having no domicile there to which their game-keeper could be attached, would in many instances be deprived of the benefit of appointing

such persons; and that the bona fide appointment of the defendant, as game-keeper of a distant manor belonging to the college, satisfied the statute. It was next contended, that in order to protect the defendant, it was necessary that he should take and kill game for the sole use and immediate benefit of the lord. But, supposing that to be necessary, the learned judge was of opinion that a game-keeper regularly appointed, proved simply to have taken or killed game, was to be presumed to have so done according to law, (especially in an action on a penal statute,) until the contrary were proved: and there being no evidence in this case, that the defendant was killing game for the use of any person other than the lord of the manor, he advised the jury to find a verdict for the defendant; which they did accordingly. In last Michaelmas term it was moved to set the verdict aside, on the ground of a misdirection in law; there being no evidence that the defendant, who was admitted not to be qualified suo jure, was either "truly and properly a servant of the lord," or "a person immediately employed and appointed to take and kill the game for the sole use or benefit of the lord." And the Case of Rogers v. Carter (*a*) was referred to; where, though it was held that a lord of a manor might appoint an unqualified person, not a menial servant of his, to kill game; yet it seemed to be understood that the deputation must be confined to killing game for the lord's own immediate use; and though such a person was held to be protected from having his gun seized even off the manor: yet it was considered that he was liable to the penalty of killing game out of the bounds of his deputation. So here it was necessary for the defendant to shew that the game was killed for the use of the college by which he was deputed; without which he subjected himself to the penalty.—In this term, *Shepherd*, Sergt. and *Burrough* were to have

A. D. 1809.

(*a*) 2 Wils. 387. 390.

A. D. 1809. shewn cause against the rule; and *Garrow* and *Murray-at* were heard in support of it. But the Court (in the absence of Lord *Ellenborough* who was ill) said, that the defendant having been deputed game-keeper by the lord of the manor, it might be presumed that the game was killed for the use of the lord, if nothing appeared in evidence to the contrary. Rule discharged.

Anonymous. 1 *Campbell's Rep. p.* 517.

If an individual has a right of fishery in a navigable river, it is subject to the right of the public to use the river for all the purposes of navigation.—Action for disturbing plaintiff's fishery in the river Tweed. It was proved that the defendant's ship was moored against a rock on the bank of the river, where she delivered her cargo, and that plaintiff was prevented by the situation of the ship from taking so many fish as he would otherwise have done. It further appeared, that ships frequently lay there, waiting for a wind, and that there were mooring-rings upon the rock, to one of which the ship in question was fastened.—*Wood*, B. A navigable river is a public highway, and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please. Nevertheless, if they abuse that right so as to work a private injury, they are liable to an action. The question will therefore be, whether the defendant has abused his right? The privilege of the plaintiff must be subservient to the right of the public. It would be of very mischievous consequences if the owner of a fishery could prescribe to the public how and where they are to moor in a navigable river. The only case I remember like this, was where a man obstinately refused to remove his ship from opposite a wharf, although it would have been just the same if he had moved a little one way or the other; and therefore he abused his right, and the plaintiff recover-

ed. The defendant had a right to moor and remain where his ship lay, as long as convenience required. Yet, if he acted wantonly and maliciously for the purpose of injuring the fishery, the plaintiff is entitled to a verdict, but not otherwise. A. D. 1809.

Talbot v. Eagle. 1 *Taunton's Rep. p.* 410.

A commission of captain of volunteers, signed by the lord lieutenant of a county, does not confer the degree of an esquire. Nor is the captain's son thereby qualified to kill game.

This was an action brought against the defendant to recover the penalty of 5*l.* given by the Statute of 5 Ann. c. 14. s. 4. for killing game, not being duly qualified. Upon the trial of this cause before *Grose*, *J.* at the Suffolk spring assizes, the defendant, to prove his qualification, gave in evidence a commission signed by the lord lieutenant of the county of Suffolk, constituting the defendant's father the captain commandant of a corps of volunteer infantry, and styling him an esquire, and also the Gazette announcing his appointment, and he relied on the Stat. 44 *G.* 3. c. 54. s. 26. which enacts that all officers in corps of volunteers, having commissions from lieutenants of counties, shall rank with the officers of his majesty's regular forces. The jury found a verdict for the plaintiff.—*Shepherd*, Sergt. now moved to set aside the verdict and enter a nonsuit, contending that the defendant's father had by this appointment been created an esquire. But the Court was clearly of opinion that the statute meant only the same military rank; the lord lieutenant of a county could not confer honours, there was no pretence to call this gentleman an esquire, and they refused the rule.

Boulcott v. Winnill. 2 *Campbell's Rep. p.* 261.

There may be a valid custom in a manor within the limits of an antient forest belonging to the crown,

Trespass for breaking and entering the plaintiff's close in the parish of Westham, in the county of Essex, and cutting down and prostrating the pales and fences standing therein. Justification under a right of common of pasture over the locus in quo. Replication, that the locus in quo is, and from time immemorial has been

A. D. 1809.

for the lord, with the assent of the homage, to grant parcels of the waste to be held in severalty by copy of court roll and enclosed, in exclusion of persons having rights of common.

within, and parcel of, the manor of Westham; and that there is, and from time immemorial hath been, "a certain ancient and laudable custom there used and approved of (that is to say) that at the general courts baron or customary courts from time to time holden in and for the said manor, the lord or lords thereof for the time being hath and have granted, and been used, &c. and still, &c. by the hands of the steward of the said manor for the time being, with the assent of the homage, by the rod, according to the custom of the said manor, any pieces or parcels of the land within the said manor, being part of the waste thereof, to any person or persons willing to take the same, to be holden of the lord or lords of the said manor by copy of court roll thereof, at the will of the lord, &c. and that such person or persons to whom such grants have been and may be made, hath and have enclosed, fenced off, held, and enjoyed, and been used, &c. and still, &c. such pieces or parcels of land so granted as aforesaid, in severalty after such grants, and during the continuance thereof to his and their own use, against all persons having rights of common therein, to the exclusion and abolition of such rights of common;" and that the locus in quo being granted to the plaintiff according to this custom, he entered and enclosed it, and kept it so enclosed till the defendant, of his own wrong, committed the trespasses attempted to be justified. Rejoinder traversing the custom; and issue thereupon. Various instances were proved from the year 1632 down to the present time, in which different parcels of the wastes of the manor had been granted and enclosed in the manner stated in the replication. It further appeared that the manor of Westham lies partly within the ancient forest of Waltham, which has immemorially belonged to the crown, and that the locus in quo is in that part of the manor which is within the limits of the forest, and is subject

to the jurisdiction of the forest courts. There was nearly an equal number of grants in the part of the manor within, as in the part of the manor without, the forest. —*Shepherd*, Sergeant, for the defendant contended, that in point of law the Jury were bound to find against the custom. Within a royal forest no enclosures are to be permitted. The deer must have full range over its whole extent. This custom of enclosing is quite inconsistent with the forest rights which have been vested in the crown from time immemorial. If one part of the forest might be enclosed, so by possibility might the whole, and the forest might thus be entirely extinguished. The custom set up was tantamount to a right to disafforest at the will of the lord and the homage, which clearly could not subsist in law. The forest rights, as regulated by the charter of the forest and other statutes, were as much recognized and protected by law as any other prerogative of the crown. The verderors of Waltham forest were in the constant habit of throwing down fences and enclosures erected within its limits. The practice of granting pieces of the waste of Westham manor within the forest for the purpose of being enclosed, might have prevailed for a considerable length of time; but being entirely incompatible with the rights of the crown, it could not be considered a legal and subsisting custom.—Sir *A. M'Donald*, C. B. was of opinion that the custom was clearly made out in point of fact, and wished that the question as to its compatibility with the rights of the crown might be discussed elsewhere. Accordingly the plaintiff had a verdict, and in the ensuing term *Shepherd*, Sergeant, applied to the Court of K. B. for a rule to shew cause why the verdict should not be set aside, and a new trial had. He took the same ground as at Nisi Prius, and contended, that no such custom could legally subsist within the limits of a royal forest.—Lord *Ellenborough*. I A. D. 1809.

A. D. 1809. see no reason why the waste may not legally be granted out in the manner stated in the replication, although part of the manor be within the royal forest of Waltham. The crown may still exercise the same rights of forest over it as before. Whether the deer be excluded, must depend upon the nature of the enclosures. If the fences erected are higher than are permitted by the laws of the forest, the forest officers may still interfere, and break them down. According to the custom, the grant is only to the exclusion and abolition of rights of common, not of the rights of forest. I know instances in Windsor forest in which the crown has made grants in severalty, reserving the rights of forest, with an advanced rent while these rights shall not be exercised. I think the issue has been properly found for the plaintiff. The other Judges concurring, a rule nisi was refused.—*Garrow* and *Marryat* for the plaintiff.—*Shepherd*, *Best*, Sergeants, *Gurney* and *Curwood* for the defendant.

It was formerly doubted how far a custom for the lord to make grants of the waste with the assent of the homage, was good, where a sufficiency of common is not left; but it is now settled that the practice of making such grants is evidence of a right to do so reserved by the lord when he granted a right of common over the waste, and that therefore the former right is paramount to the latter. Folkard v Hemmett, 5 T. R. 417. n. So the lord may dig clay pits in the waste, or authorize others to do so, without leaving sufficient herbage for the commoners, if such right can be proved to have been always exercised by the lord. Bateson v. Green, 5 T. R. 411. And where there is a custom to grant parcels of the waste, as in this case, the parcels so granted are to be considered in all respects copyhold tenements as if they had been so from time immemorial. Lord Northwick v. Stanway, 3 Bos. & Pul. 346. So that where land has been demisable by copy of court roll, a new copyhold may be created at this day.—Vide Duberley v. Page, 2 T. R. 391. Clarkson v. Woodhouse, 5 T. R. 412. n. Shakespeare v. Peppin, 6 T. R. 741.

A. D. 1811. *Rex v. Rogers.* 2 *Campbell's Rep. p.* 654.

To support an indictment on 42 Geo. 3. c. 107. for coursing

This was an indictment on 42 Geo. 3. c. 107. s. 1. (*a*)

(*a*) Which enacts, "that if any person or persons shall wilfully course or hunt, or take in any slip, noose, toil or snare, or

for coursing deer in an enclosed ground, belonging to R. B. C. Esq. without the consent of the said R. B. C. the owner of such deer, and without being otherwise duly authorized. The question was, whether the onus lay upon the prisoner, to prove that he had the consent of R. B. C. the owner of the deer, to course them in the place in question?—*Lawrence*, J. held, that it was necessary, on the part of the prosecution, to call the owner of the deer, for the purpose of proving, that he had not given his consent to the prisoner to course them; and this witness not appearing, the Jury were directed to find a verdict of Not Guilty.—*Mence* for the prosecution.—*Campbell* for the prisoner.

A. D. 1811.

deer in an enclosed ground, it is necessary, on the part of the prosecution, to call the owner of the deer to prove, that he did not give his consent to the prisoner to course them.

kill, wound or destroy, or shoot at, or otherwise attempt to kill, wound or destroy, or shall carry away any red or fallow deer kept or being in the enclosed part of any forest, chase, purlieu, or ancient walk, or any enclosed park, paddock, wood or other enclosed ground wherein deer are, or have been, or shall be usually kept, without the consent of the owner of such deer, or without being otherwise duly authorized, or shall knowingly be aiding, abetting or assisting therein or thereunto, every person so wilfully offending as aforesaid in any of the cases above-mentioned, shall be deemed and taken to be guilty of felony, and being lawfully convicted thereof, upon indictment, shall be adjudged to be transported for the term of seven years."

Vivian v. Blake and others. 11 *East's Rep. p.* 263.

A. D. 1809.

This was a question of costs, which was argued in the last term by *Moore* for the plaintiff, and *Dampier* for the defendants; and was then directed to stand over for consideration. And now Lord *Ellenborough*, C. J. delivered the opinion of the Court. This was a rule obtained in the last term on behalf of the plaintiff, calling on the defendants to shew cause why the master should not tax the plaintiff his costs, on the ground that a verdict was entered for the plaintiff on the first plea of not guilty, with 1*s.* damages. The pleadings in substance were these: the declaration complained of a trespass by the defendants in the plaintiff's free fishery in the creek,

Trespass for breaking and entering the plaintiff's free fishery in A. and also in B. and also in A. and B. Pleas, 1. Not Guilty. 2. That the said free fisheries were parcel of a navigable harbour, &c. common

A. D. 1809.

to all the king's subjects. Replication, prescribing for a free fishery in the said place in right of the plaintiff's manor. Rejoinder, taking issue on such prescription. Held that on verdict for the plaintiff on the general issue, and for the defendant on the prescription, the latter going to the whole declaration, the plaintiff is not entitled to costs. Same point, 11 East. 52.

otherwise the river, in the parish of St. Anthony; and also in the free fishery of the plaintiff in the parish of St. Just; and also in his free fishery in the parishes of St. Anthony and St. Just. Pleas, first, Not Guilty, generally. 2d, That the said free fisheries were parcel of a public navigable harbour or creek in which the tide flowed and reflowed, where all the king's subjects had a right to fish. Replication to the second plea, protesting that the free fisheries are not parcel of the public harbour, replies, that the plaintiff is seised in fee of the manor of Bohurra, and prescribes for a free fishery in the said place in right of his said manor. Rejoinder takes issue on the prescription. A verdict has been entered on the general issue for the plaintiff, with one shilling damages; and on the prescription, for the defendant. The question on the verdicts on these issues is, whether the issue on the prescription, which has been entered for the defendant, do not go to the whole trespass; for if it do, the finding on the whole record being in favour of the defendants, the plaintiff cannot be entitled to costs. And we are of opinion that the issue found for the defendants does go to the whole. The free fishery claimed by the plaintiff, and which by his count he complains of the defendants having broken and entered, is by his replication confined to a free fishery in the right of his manor of Bohurra; and the verdict finds that he is not entitled to any such free fishery. It resembles the case put in argument at the bar, where to an action of trespass quare clausum fregit the defendant pleads not guilty, and liberum tenementum of A.; by whose command the defendant entered. The replication deduces a title to the plaintiff under A.; which derivative title is traversed, and found for the defendant: in which case the plaintiff cannot be entitled to costs, because the issue found for the defendant goes

to the whole. The consequence will be, that the rule must be discharged. A. D. 1809.

Vere v. Lord Cawdor, and King. 11 *East Rep. p.* 568.

This was an action of trespass for shooting and killing a certain dog of the plaintiff. The defendants pleaded the general issue: and the defendant King also pleaded specially, that before and at the time when, &c. Lord Cawdor was and still is possessed of a certain close within and part and parcel of the manor of Kidwelly in the county of Caermarthen, of which he was lord, and the defendant King before and at the said time when, &c. was the game-keeper of the said manor, duly deputed and appointed by said lord to preserve the game upon the said manor; and because the plaintiff's dog at the said time when, &c. was in the said close of the said lord, so being part and parcel of the said manor, running after, chasing, and hunting divers hares there, the defendant King as such game-keeper, &c. and within the said close, &c. for the preservation of the said hares, shot and killed the said dog. To this there was a general demurrer.—*Marryat*, in support of the demurrer, after stating the question to be, whether a game-keeper of a manor had a right to shoot every dog which he found following game within the boundaries of the manor, and that too in a case where the dog is not stated to have belonged to an unqualified person (*a*), or to have been encouraged by the owner to pursue the game, was stopped by the Court, who were clearly satisfied that the plea was bad, and observed to the plaintiff's counsel that it did not even state that the killing of the dog was necessary for the preservation of the game.—*Scarlett*, for the defendant, replied upon the Cases of

A plea to an action of trespass, for killing the plaintiff's dog, cannot justify the act by stating that the lord of the manor was possessed of a close, and that the defendant, as his game-keeper, killed the dog when running after hares in that close for the preservation of the hares; such plea not even stating that it was necessary to kill the dog for the preservation of the hares; nor stating that it was the dog of an unqualified person.

(*a*) By Stat. 22 and 23 Car. 2. c. 25. lords of manors may appoint game-keepers who may take and seize all guns, dogs, &c. to kill game, used by any person who by that act is prohibited from keeping the same.

A. D. 1809. Wadhurst v. Damme (*a*), and Barrington v. Turner (*b*), as shewing that the justification need not alledge that the killing of the dog was a necessary means of preserving the game; but only, as in the first case, that the dog was divers times killing conies in the warren, and therefore the warrener finding it there at the time when, &c. running at the conies there, killed it. And in the second, that the greyhounds chased a deer in the defendant's park, and there killed her, on which to prevent more mischief by them, the defendant took the greyhounds and killed them. In which latter case there could have been no necessity for killing the dogs after the defendant had taken them. The cases on this subject, he observed, were collected by Mr. Serg. *Williams* in a note to the Case of Wright v. Ramscot (*c*), who refers a similar precedent of such a plea in 2 Rich. Prac. C. P. 435. (4th ed.) justifying the killing of a greyhound for coursing deer in a park. [*Le Blanc* J. To make these cases bear upon the present, you must assimilate the hare to rabbits in a warren, or deer in a park, which are the subjects of property.] In Kemble v. Hickeringill, (*d*) Powell, J. says, every man has a property in animals feræ naturæ while they are upon his own land ratione soli: and in Sutton v. Moody (*e*), the Court say, that "a warren is but a franchise to keep the conies; and the owner has no more property in the conies themselves than any man that has them in his own land. If one start a hare in my close, and kill her there, it is my hare; otherwise if he hunt her into the ground of a third person, then it is the hunter's."—Lord *Ellenborough*, C. J. The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another ground? And if there be any precedent of that sort, which outrages all reason

(*a*) Cro. Jac. 45.
(*b*) 3 Lev. 28.
(*c*) 1 Saund. 84.
(*d*) 11 Mod. 75.
(*e*) Salk. 556 1 Ld. Ray. 250. and Com. Rep. 34.

and sense, it is of no authority to govern other cases. There is no question here as to the right to the game. The game-keeper had no right to kill the plaintiff's dog for following it. The plea does not even state that the hare was put in peril, so as to induce any necessity for killing the dog in order to save the hare.—Per Curiam. Judgment for the plaintiff. A. D. 1809.

Carrington v. Taylor. 2 *Campbell*, p. 258.

It is actionable to discharge a gun so near an ancient decoy as to frighten the wild fowl from it, even without firing at the wild fowl in the decoy.

This was an action on the case for disturbing the plaintiff's ancient decoy, situate at Beaumont-cum-More, in the county of Essex. It appeared that the defendant, who earned his subsistence by shooting wild fowl, fired his gun from a boat in a salt-water creek, at the distance of two or three hundred yards from the decoy, without approaching near it, or trying to kill any of the birds which had entered it; but that the report caused them to leave it in great numbers, and to fly off to a distant part of the coast.—*Garrow* contended, that the action could not be maintained without evidence that the defendant had shot at the wild fowl in the decoy, or had fired his piece with the malicious intent of frightening them away. But his only object was to earn a subsistence by the business which he followed; and although the wild fowl at which he took aim, might by possibility have gone to the plaintiff's decoy, and been caught there, yet they were at the time of common right, as much as if they had been met with many leagues out at sea. The defendant was equally entitled to kill them on the wing, as the plaintiff after they were ensnared in the decoy. Some of the ducks already in the decoy might be frightened by the report; but it would be too much to say, that every noise that could be heard there, from whatever distance, was illegal and actionable; otherwise, the operations of husbandry and the business of life must be stopped for miles round the

A. D. 1809 spot where one of these decoys is unfortunately situated. It was necessary, therefore, to look to the intent; and where that was innocent, the foundation of the action failed.—*M'Donald*, C. B. If the plaintiff has been injured and aggrieved by what the defendant has done, the law infers that the defendant maliciously intended to injure and aggrieve him. And there seems no doubt that the decoy was rendered less valuable by the wild fowl being frightened from it, and deterred from returning. This being an ancient decoy, it is privileged in law, and whatever seriously disturbs it is actionable. From long uninterrupted enjoyment, a grant must be presumed from the owners of the surrounding lands, for which an adequate consideration may be supposed to have been originally given; and an ancient decoy will be protected by the law, as well as ancient lights, or the enjoyment of a watercourse. The plaintiff had a verdict.

In the ensuing term *Garrow* moved for a rule to shew cause why this verdict should not be set aside; and in addition to his former arguments contended that there was no distinction between a decoy and a preserve for game, but that clearly no action could be maintained for frightening game from a preserve while a man shot upon his own land.—The Court, however, said, a difference was established by the old cases between a preserve and a decoy; and thinking that a sufficient disturbance had been proved, refused a rule to shew cause.—*Shepherd*, Sergeant, and *Pooley* for the plaintiff.—*Garrow* and *Marryat* for the defendant.

Vide Keble v. Hicheringill, 11 Mod. 74. 130. 3 Salk. 9. Bul. N. P. 79.

Carrington v. Taylor. 11 *East's Rep. p.* 571.

Firing at wild fowl to kill and make

This was an action on the case in which the plaintiff declared, that whereas he before and at the time of the

A. D. 1809.

grievance after mentioned, and from thence hitherto hath been and still is lawfully possessed of and in a certain place prepared with suitable and proper conveniencies for decoying, taking, and catching of wild fowl, commonly called a decoy, situate and being at the parish of Beaumont-cum-More in the county of Essex, and by means of such decoy during all the time aforesaid, until the committing of the grievance after mentioned, had been and was used and accustomed to decoy, take and catch divers great quantities of wild fowl, to wit, wild ducks, mallards, teal, and widgeon, by reason whereof great profits and advantages had accrued and still ought to accrue to him; yet the defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure and aggrieve the plaintiff, and to deprive him of a great part of the profits and advantages arising from his said decoy, afterwards and whilst the plaintiff was so as aforesaid possessed thereof, on the 1st of January 1809, and on divers days, &c. shot off and discharged divers guns and other engines, and made and caused to be made divers violent and loud noises so near to the said decoy of the plaintiff as thereby then and there greatly to disturb and frighten divers wild fowl then being at or near the said decoy; insomuch that divers wild fowl, to wit, 500 wild ducks, &c. then and there flew away and wholly quitted the said decoy, and divers other wild fowl, to wit, &c. which were then and there about to enter the said decoy were thereby then and there prevented from entering the same; and by means thereof the plaintiff was prevented from decoying, catching and taking the said wild fowl in such plenty as he otherwise might and would have done, to wit, at, &c. and thereby the plaintiff lost and was deprived of the profits, &c. which might and otherwise would have accrued to him from his said decoy, to wit, at, &c. Wherefore, &c. At the trial of this case before the Lord C. B. *Mac-*

profit of them, by one who was at the time in a boat on a public river or open creek, where the tide ebbs and flows, so near to an ancient decoy on the shore (about 200 yards) as to make the birds there take flight; the defendant having before fired at a greater distance from the decoy, which brought out some of the birds from thence, though he did not fire into the decoy pond, is evidence of a wilful disturbance of and of damage to the decoy, for which an action on the case is maintainable by the owner.

A D. 1809. *donald*, at Chelmsford, the plaintiff's right to the decoy, which was an ancient decoy, was proved; and it also appeared that the defendant sought his livelihood in part by shooting wild fowl from his boat on the water, for which boat with small arms he had a licence from the Admiralty for fishing and coasting along the shores of Essex; on one of the salt creeks of which county, called the Blackwater river, where the tide ebbs and flows, near Walton, the decoy in question was situated. The only proof of the disturbance by the defendant was, that he, being out in his boat shooting wild fowl in a part of the open creek, first fired his fowling-piece within about a quarter of a mile of the plaintiff's decoy, when 2 or 300 wild fowl came out: and afterwards approached nearer, and fired again at wild fowl on the wing at the distance of about 200 yards and upwards from the decoy pond, when he killed several widgeons, and immediately on the noise of the gun 4 or 500 wild fowl took flight from the pond; but it did not appear that he fired into the decoy. The learned Judge left this as evidence to the Jury of a wilful disturbance of the plaintiff's decoy by the defendant, for which this action would lie; and the Jury found their verdict for the plaintiff with 40*s.* damages.—*Garrow* now moved to set aside the verdict, as being against law and evidence; the defendant having a right, he said, to shoot at the wild fowl in the place where he was, which was an open creek or arm of the sea, where the tide flowed and reflowed; and not having gone upon the plaintiff's land, nor fired into his decoy at the birds there.—The Court however, said, that they saw no ground for disturbing the verdict in point of law: and *Le Blanc*, Justice, referred to an old precedent of such an action (*a*), which had been followed by one or two others

(*a*) The case alluded to is cited in Bull. Ni. Pri 79. as Hickeringal's Case, Hil. 5 Ann; which is reported by the name of Keeble

within his own remembrance on the Norfolk circuit. A. D. 1809.
And the evidence they observed was proper to be left to the Jury who had decided upon it. Rule refused.

v. Hickeringall, in 11 Mod. 74. 130. 3 Salk. 9. and Holt's Rep. 14. 17. 19. From these it appears to have been an action on the case for disturbing the plaintiff's decoy; and after a verdict for the plaintiff, it was moved to arrest the judgment for the insufficiency in law of the declaration. The case appears to have been twice argued, first in Hil. 5 Ann; and afterwards in Easter 5 Ann.; the arguments are best reported in Holt's Rep. 14 and 17. And in p. 14. the facts are stated thus, "that the defendant was lord of a manor and had a decoy; and the plaintiff had also made a decoy upon his own ground, which was next adjoining to the defendant's ground, and pretty near also to the defendant's decoy; and therein the plaintiff had decoy and other ducks, whereof he made considerable profit;" and declares, &c. It does not appear how the facts first mentioned were before the Court upon the motion in arrest of judgment, as they did not appear upon the face of the declaration; nor did the fact there appear which is afterwards (p. 17.) stated, that the defendant was upon his own close when he shot off the gun: but these facts were probably assumed arguendo, as consistent with the allegations of the declaration*. Not that perhaps the introduction of these facts would have varied the question; as the declaration proceeded to charge that the defendant fired the guns which made the disturbance with design to damnify the plaintiff, and to frighten away the wild fowl from his decoy; which consequently precluded, after verdict, any consideration of the question, whether he had not a right to do these acts on his own ground as a mean of taking the birds for his own benefit. In the report of the Case in 11 Mod. 75. Lord Chief Justice Holt says, "Suppose the defendant had shot in his own ground; if he had occasion to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff is another thing, and a wrong." It should seem to be the same thing if he fired for the purpose of disturbing the wild fowl in his neighbour's decoy, that he might take the chance of benefiting himself by shooting them when on the wing in consequence of such disturbance. The following statement of the declaration and judgment in that case, which is taken from a copy of Lord Chief Justice Holt's own MS. in my possession, shews the true nature of the action, and of the grounds on which it was decided:

Keeble against Hickeringill.

Action upon the case. Plaintiff declares that he was, 8th November, in the second year of the queen, lawfully possessed of a close of land called Minott's Meadow, et de quodam vivario†, vocato a decoy pond, to which divers wild fowl used to resort and

An action on the case lies for discharging guns near

* Vide what is said by Holt, C. J. at the bottom of the next page.

† 2 Inst. 100. Vivarium is a word of large extent, and ex vi termini signifieth a place in land or water where living things are kept.

A. D. 1809.

the decoy pond of another, with design to damnify the owner by frightening away the wild fowl resorting thereto, by which the wild fowl were frightened away and the owner damnified.

come; and the plaintiff had at his own cost and charges prepared and procured divers decoy ducks, nets, machines, and other engines for the decoying and taking of the wild fowl, and enjoyed the benefit in taking them: the defendant, knowing which, and intending to damnify the plaintiff in his vivary, and to fright and drive away the wild fowl used to resort thither, and deprive him of his profit, did, on the 8th of November, resort to the head of the said pond and vivary, and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder did drive away the wild fowl then being in the pond: and on the 11th and 12th days of November the defendant, with design to damnify the plaintiff, and fright away the wild fowl, did place himself with a gun near the vivary, and there did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wild fowl were frighted away, and did forsake the said pond. Upon not guilty pleaded, a verdict was found for the plaintiff and 20*l.* damages.—Holt, Chief Justice. I am of opinion that this action doth lie. It seems to be new in its instance, but it is not knew in its reason or principle of it. For, 1st, this using or making a decoy is lawful. 2dly, This employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first. Every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law: but it as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wild fowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not effect any damage, yet are they mischievous in themselves; and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; as to say a merchant is broken, or that he is failing, or is not able to pay his debts. 1 Roll. 60, 1; all the cases there put. How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employment. Now there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action, though by grant from the king. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. 22 H. 6. 14, 15. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases

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But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4. 47. One schoolmaster sets up a new school to the damage of an antient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. 29 E. 3. 18. A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market; an action lies, because it imports damage. Action upon the case lies against one that shall by threats fright away his tenants at will. 9 H. 7. 8. 21 H. 6. 31. 9 H. 7. 7. 14 Ed. 4. 7. Vide Rastal. 662. 2 Cro. 423. Trespass was brought for beating his servant, whereby he was hindered from taking his toll; the obstruction is a damage, though not the loss of his service. There was an objection that did occur to me, though I do not remember it to be made at the bar; which is, that it is not mentioned in the declaration what number or nature of wild fowl were frighted away by the defendant's shooting. As in 5 Rep. 34. Playter's Case. Trespass quare clausum suum fregit, et pisces suos cepit. After a verdict for the plaintiff, and entire damages, it was moved in arrest of judgment, that the declaration was not good, because it was not said of what nature, nor of what number the fishes were; which was held to be a fatal exception, not helped after verdict by the Statute of Jeofails, Resp. But indeed here is not the number stated. Now considering the nature of the case, it is not possible to declare of the number that were frighted away; because the plaintiff had not possession of them to count them. Where a man brings trespass for taking his goods, he must declare of the quantity, because he, by having had the possession, may know what he had, and therefore must know what he lost. This is plain by several authorities. 2 Cro. 123. Dent v. Oliver. Trespass for beating and hindering his servant from taking and collecting his toll; objection that it is not said what quantity of toll he was to take; but that could not be known. Owen. Rep. 109. Escott v. Laurenny. Action upon the case because the defendant hindered him from taking toll of divers pieces of wool, and sheweth not how many; yet the declaration was good. 2 Cro. 435. Johns v. Wilson. Trespass quare clausum fregit, et spinas suas ad valentiam succidit. Exception was taken to the declaration because the number of the thorns was not mentioned: yet held not to be a good exception. Alleyn. 22. Lodge v. Weedon. Action upon the case; the plaintiff declared that the defendant killed divers cattle infected with the murrain, and threw the entrails into the plaintiff's field, per quod diversa averia of the plaintiff's interierunt. After verdict, exception was taken in arrest of judgment, because it did not appear how many cattle of the plaintiff's did thereby perish: yet judgment was given for the plaintiff, because there need not such certainty in an action upon the case, because the

A. D. 1809. plaintiff is only to recover damages for them. 9 Rep. 43, 44. Earl of Salop's Case. An action on the case for hindering the plaintiff in taking the profits of his steward-ship of such a manor; not shewing what the profits were, or how much they amounted to; it was never questioned but the declaration was good. The plaintiff in this case brings his action for the apparent injury done him in the use of that employment of his freehold, his art, and skill that he uses thereby. Secondly, says Mr. Solicitor, here is not the nature of the wild fowl stated; for wild fowl are of several sorts; ducks, teal, mallard, and indeed all birds that are wild are wild fowl. Resp. It is true in the large signification of the word they are so: and also the word fowl comprehends all birds and poultry; but wild fowl are taken in a more restrained sense; pheasants and partridges are not thereby understood, for they are fowl of warren. Manwood's Forest Law, cap. 4. sec. 3. 1 Register, 93. 96. F. N. B. 86. Rastal 585. Wild fowl are known in the law, and described by the Statute of 25 H. 8 c. 11. which doth take notice of wild fowl. The title of the statute is "against destroying of wild fowl. It recites that there hath been within this realm great quantities of wild fowl, as ducks, mallards, wigeons, teals, wild geese, and divers other kind of wild fowl, which is reasonable to be understood of that sort that do get their prey in that manner. The Stat. of 3 and 4 Ed. 6. c. 7. which repeals that of the 25 H. 8 takes notice of wild fowl, and hath the general word wild fowl. without coming to particulars. Therefore when the declaration is of wild fowl, it is not to be understood that sparrows, wrens, or robin-red-breasts can be thereby included. Besides *Hirundines volucres*, in Littleton's Dictionary, are understood wild fowl, as being the only words in Latin that we have to express it. Litt. Dict. tit. Wild Fowl. And when we do know that of long time in the kingdom these artificial contrivances of decoy ponds and decoy ducks have been used for enticing into those ponds wild fowl, in order to be taken for the profit of the owner of the pond who is at the expense of servants, engines, and other management, whereby the markets of the nation may be furnished; there is great reason to give encouragement thereunto; that the people who are so instrumental by their skill and industry so to furnish the markets should reap the benefit and have their action. But, in short, that which is the true reason is that this action is not brought to recover damage for the loss of the fowl, but for the disturbance; as, 2 Cro. 604. Dawney v. Dee. So is the usual and common way of declaring.

A. D. 1811. *The King v. Turner and seven others.* 13 *East. p.* 228.

An indictment will not lie for conspiring to commit a civil trespass upon property by agreeing to go and

This was an indictment for a conspiracy, which stated that the defendants unlawfully and wickedly devising and intending to injure, oppress, and aggrieve T. Goodlake, of Letcombe Regis, in the county of Berks, Esquire, on the 24th of November, 50th Geo. 3 with force and arms, at East Challow, in the county aforesaid,

A. D. 1811.

unlawfully and wickedly did conspire, combine, confederate, and agree together, and with divers other persons unknown, to go into a certain preserve for hares at Letcombe Regis aforesaid, in the county aforesaid, belonging to the said T. G. without the leave and against the will and consent of the said T. G. to snare, take, kill, destroy, and carry away the hares in the said preserve then being, and to procure divers bludgeons and other offensive weapons, and to go to the said preserve armed therewith for the purpose of opposing any person who should endeavour to apprehend or obstruct or prevent them in and from carrying into execution their unlawful and wicked purposes aforesaid; and that the said defendants, in pursuance of and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid before had, afterwards, to wit, on the said day, &c. about the hour of 12 in the night of the same day, with force and arms, at East Challow aforesaid, in the county aforesaid, unlawfully and wickedly did procure divers large bludgeons, and other offensive weapons, and did go to the said preserve of the said T. G. armed therewith, for the purpose of opposing any persons who should endeavour to apprehend, obstruct, or prevent them in and from carrying into execution their unlawful and wicked purposes aforesaid. And the said defendants, being so armed as aforesaid, in further execution of their unlawful and wicked purposes aforesaid, then and there did set divers, to wit, 100 snares, for the purpose and with the intent to take, kill, destroy, and carry away the hares in the said preserve then being; in contempt of the king and his laws, to the evil example of others, to the great damage of the said T. G. and against the peace, &c. After a verdict of guilty, it was moved in the last Term by *Jervis*, to arrest the judgment for the insufficiency of the charge, which was only that of an agreement to

by going into a preserve for hares, the property of another, for the purpose of snaring them; though alleged to be done in the night by the defendants, armed with offensive weapons for the purpose of opposing resistance to any endeavours to apprehend or obstruct them.

A. D. 1811. commit a mere trespass upon property, and to set snares for hares, and was not an indictable offence, but at most only an injury of a private nature, prohibited sub modo, under a penalty. And 2 Hawk. P. C. c. 25. s. 4. was referred to. Another objection was taken, that the place where the offence was committed was not alleged with sufficient certainty and precision.—*Gleed* now opposed the rule, and endeavoured to sustain the indictment upon the authority of 2 Hawk. P. C. c. 72. s. 2. where it is said that all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law; as where several confederate to maintain one another in any matter whether it be true or false. The cases also shew that it is equally an offence to combine to do a lawful act by unlawful means, or to an unlawful end, as to do an act itself unlawful; as in the instance of workmen conspiring together to raise their wages (*a*), or parish officers conspiring to marry a helpless pauper into another parish, to settle her there and rid themselves of her maintenance (*a*). And in all cases of unlawful conspiracy, the mere unlawful agreement to do the act, though it be not afterwards executed, constitutes the offence; according to Rex v. Armstrong and others (*b*), and Rex v. Rispal (*c*). In this latter case the indictment for conspiring to charge a man with a false fact, and exacting money from him under pretence of stifling the charge, was sustained; though the fact imputed, which was merely that of taking hair out of a bag belonging to the defendant Rispal, did not import in itself to be any offence.—[Lord *Ellenborough*, Chief Justice. All the cases in conspiracy proceed upon the ground that the object of the combination is to

(*a*) The King v. The Journeyman Taylors of Cambridge, 8 Mod. 11.
(*a*) The King v. Edwards and others, 8 Mod. 320.
(*b*) 1 Ventr. 304.
(*c*) 3 Burr. 1320. and 1 Blac. Rep. 368.

be effected by some falsity; insomuch that in Tailor and Towlin's Case in Godb. 441. it was held necessary in conspiracy to allege the matter to be false et malitiose. By the old law indeed the offence was considered to consist in imposing by combination a false crime upon a person. But are you prepared to shew that two unqualified persons going out together by agreement to sport is a public offence?] Modern cases have carried the offence further than some of the old authorities, such as the King v. Eccles and others (*d*), where the defendants were convicted upon a charge of conspiring together by indirect means (not stating what those means were) to prevent a person from carrying on his trade. And in the King v. Spragge and others (*e*), which charged the defendants with a conspiracy to indict and prosecute W. G. for a crime liable by law to be capitally punished, and that in pursuance of such conspiracy they did afterwards indict him; one of the objections was, that the charge was only of a conspiracy to indict not of a conspiracy to indict falsely: but it was overruled.—Lord *Ellenborough*, Chief Justice. That was a conspiracy to indict another of a capital crime: which no doubt is an offence. And the case of the King v. Eccles and others was considered as a conspiracy in A. D. 1811.

(*d*) M. 24 G. 3. B. R. Mr. Durnford's MS. note of that case, (which is also noticed by him in Wiles's Rep. 583. n *a*) states that it came on upon a motion by Chambre to arrest the judgment on an indictment for a conspiracy, of which the defendants had been found guilty, which indictment stated that the defendants conspired together by indirect means to prevent one H. B. from exercising the trade of a tailor. And it was contended that it should have stated the fact on which the conspiracy was founded, the means used for the purpose. And Rex v. Haw, 1 Stra. 699. Rex v. Munoz, 1 Stra. 1127. and Rex v. Sterling, 1 Lev. 125. were cited. Lord *Mansfield*, Chief Justice. The conspiracy is stated, and its object; it is not necessary that the means should be stated.—*Buller*, Justice. If there be any objection, it is that the indictment states too much; it would have been good certainly if it had not added, "by indirect means;" and that will not make it bad.

(*e*) 2 Burr. 993.

A. D. 1811. restraint of trade, and so far a conspiracy to do an unlawful act affecting the public. But I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther: I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment.—**Per Curiam, rule absolute.**

A. D. 1786. *Gundry v. Feltham.* 1 *Term Rep. p.* 334.

A person may justify trespass in following a fox with hounds over the grounds of another, if he does no more than is necessary to kill the fox. (*a*)

(*a*) But see Earl of Essex, v. Capel, post. semb. contra.

Trespass for breaking and entering the plaintiff's closes, with horses, dogs, &c. and for beating and hunting for game therein, and for breaking down, and destroying the hedges of the plaintiff. Pleas. 1st. The general issue; on which issue was taken. 2dly. And for a further plea in this behalf, as to the breaking and entering the said closes of the said plaintiff, in the said declaration mentioned, at one of the said several days and times, when, &c. in the said declaration mentioned, and with feet in walking, and with the said horses in the said declaration mentioned, and with the said hounds, greyhounds, and other dogs, in the said declaration mentioned, treading down, consuming, and spoiling a little of the grass then and there growing and being; and as to the breaking down, trampling down, treading down, prostrating and destroying a little of the hedges and fences in the said declaration mentioned, there then standing, growing, and being, in and upon the said closes, in the said declaration mentioned, by the said defendant above supposed to have been done, he the said defendant, by leave of the Court, &c says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him the said defendant, because he says, that before and at the said several

days and times, when, &c. the said hounds, greyhounds, and dogs, in the said declaration mentioned, were the hounds, greyhounds, and dogs of one Humphry Sturt, Esq.; and that the said Humphry Sturt was then a person qualified by the laws and statutes of this realm to keep and use the said hounds, greyhounds, and dogs in the said declaration mentioned. And that the said H. Sturt, before the said several days and times when, &c. to wit, on the first day of September, 1785, aforesaid, at the parish aforesaid, in the said county of Dorset, had retained and employed the said defendant, as his huntsman and servant, to hunt and take care of the said hounds, greyhounds, and dogs, in the said declaration mentioned; and that the said defendant, from that time until and at the said several days and times, when, &c. had remained and continued, and then was such huntsman and servant of the said H. Sturt as aforesaid; and that just before each of the said several days and times when, &c. he the said defendant, had started and found one of those destructive and hurtful vermin and beasts of prey naturally inclined to do mischief, called foxes, in and upon certain lands near to the said closes in which, &c. to wit, at the parish aforesaid, in the county of Dorset; and that he, the said defendant, being such huntsman and servant of the said H. Sturt as aforesaid, a little before each of the said days and times, when, &c. by the leave and licence of the said H. Sturt, in order to hunt, pursue, take, kill, and destroy the several respective foxes so started and found as aforesaid, and to hinder and prevent the said foxes from doing any mischief in the neighbourhood, had caused the said hounds, greyhounds, and other dogs in the said declaration mentioned, being the hounds, greyhounds, and dogs of the said H. Sturt, to hunt, follow, and pursue the said foxes, and that because each respective fox of the said foxes so respectively A. D. 1786.

A. D. 1736. started and found as aforesaid, a little before each and every one of the said several and respective days and times when, &c. had, during the said pursuits, fled and run out of and from the said lands where they had been so, as aforesaid, respectively started and found into and over the said closes, in which, &c. in the declaration mentioned, he the said defendant, being such huntsman and servant of the said H. Sturt as aforesaid, did, at the said days and times when, &c. in the pursuit of, and to hunt, take, kill and destroy, the said several and respective foxes, and as the only way and means for so doing, with one of the said horses in the said declaration mentioned, at each time when, &c. and with the said hounds greyhounds, and other dogs in the said declaration mentioned, follow and go after the said respective foxes into the said closes, in which, &c. with an intent to kill and destroy the same, and did take, kill and destroy the same; and, in so doing, he the said defendant, at the said days and times when, &c. did break and enter the said closes of the said plaintiff, in the said declaration mentioned, and with his feet in walking, and with the said horses in the said declaration mentioned, and with the said hounds, greyhounds, and other dogs, in the said declaration mentioned, did tread down, consume and spoil a little of the grass then and there growing and being, and a little break down, trample down, prostrate and destroy the said hedges and fences in the said declaration mentioned, then and there standing, growing, and being, in and upon the said closes in the said declaration mentioned, as he lawfully might, for the cause aforesaid, doing as little damage to the said plaintiff as he, the said defendant, possibly could; which are the said several trespasses in the introduction to this plea mentioned, and whereof the said plaintiff hath above complained against him the said defendant, and this, he, the said defendant, is ready to

verify; wherefore, he prays judgment, &c. To this there was a general demurrer, and joinder in demurrer. —*Lawrence*, for the plaintiff. The question upon this record is, whether a person hunting has a right to follow foxes upon the ground of another? The qualification of the person is entirely out of the question. By the general law, no person can go over the land of another without his permission; and, in Sutton v. Moody (*a*), Lord Holt said, "If A. starts a hare in the ground of "B. and hunts it into the ground of C. and kills it "there, the property is in A. the hunter; but A. is liable to an action of trespass for hunting in the grounds "as well of B. as of C." But the distinction which may be attempted to be taken between that case and the present is, that a fox is a noxious animal, and therefore that every person is at liberty to pursue and kill it wherever it is found. If it is so determined, it must be upon the principle, that it is for the public good to destroy the animal, and that the convenience and rights of individuals must give way: but this will equally give a right to destroy fences, to go into standing corn, or gardens and nurseries, let the mischief to the owner be ever so considerable. The principle applies as well to searching for those animals in the grounds of another, as to the pursuit of them: but such a right is denied by every law-book on the subject. In the case of Gedge v. Minne (*a*), it was determined, that the defendant could not justify digging for a badger. And though Croke said in that case, that, upon a pursuit, the defendant might follow and kill noxious animals over the grounds of a third person, without being subject to an action of trespass, yet that did not form a part of the case, and was merely founded on a dictum of Brooke, J. (*b*) in 12 Hen. 8. 10. where he said, a man might justify entering into the lands of another to kill a fox, gray, or

A.D. 1786.

(*a*) 1 Lord Raym. 250. (*b*) 2 Bulstr. 60.

A. D. 1786. an otter, because they are beasts injurious to the commonwealth. But the principal question there arose concerning the property of a stag, which had been killed in hunting. And upon this have all the subsequent decisions been made, without regarding the occasion which gave rise to it. So that this dictum in Bulstrode was merely founded on a dictum. But in 2 Rol. Abr. 558. there is an express authority against such a doctrine; for it is there said, "that the defendant could "not justify the trespass on account of hunting a fox;" and in the same case, as reported in Brownl. 224. *Fenner*, Justice, held, "that it was not lawful to break hedges in the pursuit." And breaking hedges in the present case constitutes a part of the trespass, which is confessed by this plea. These authorities are recognized in Com. Dig. title, Pleader, 3 M. 37. where it is said, the defendant cannot justify either entering or digging for a fox.—*Gibbs*, for the defendant, was stopped by the Court.—*Lord Mansfield*, Chief Justice. By all the cases as far back as the reign of Henry 8th. it is settled that a man may follow a fox into the grounds of another. It is not necessary in this case to enter into the exceptions which have been made to that general rule, because this demurrer disputes the general proposition.—*Willes*, Justice, said, that the case in Popham, 162, was much stronger than the present.—*Buller*, Justice. The question on this record is, whether the defendant is justified in following the fox at all over another man's grounds. The demurrer admits that which is averred in the plea, namely, that this was the only means of killing the fox. This case does not determine that a person may unnecessarily trample down another man's hedges, or maliciously ride over his grounds: if he does more than is absolutely necessary, he cannot justify it; and such circumstances are a proper subject for a new assignment.—Judgment for the defendant.

Earl of Essex v. Capel. Hertford Summer Assizes, 1809. A. D 1809.

Fox-hunting, when illegal.

The plaintiff declared in trespass for breaking and entering certain closes of the plaintiff, and that with hounds, dogs, and horses, he hunted, sported, and went in, along and over the said closes, and trod down and destroyed the grass and herbage of the plaintiff. The defendant pleaded several pleas. 1st. The general issue, which he afterwards withdrew. 2d. That as to breaking and entering the close, called Cashiobury Park, the defendant, with divers other persons, who, as well as the defendant, were qualified to keep hounds, had found a fox in a certain place, called Bricket Wood, not being the close of the plaintiff, and that a fox being a noxious animal, he hunted it with his dogs, hounds, and horses, and that the hunting the fox with dogs, hounds, and horses was the only way of killing the fox. In the 3d plea, it was stated, that such pursuit of the fox with dogs, hounds, and horses, was the most effectual and proper way of killing the fox. To these pleas the plaintiff replied, that hunting the fox was not the only or the most effectual way of killing and destroying it; and further stated, that the trespasses were committed for the sport and diversion of the chase, and for the purpose of amusement and pleasure only. To these replications the defendant rejoined, that the trespasses were not committed for diversion and amusement, but as the only and most effectual and proper way of killing and destroying the fox.—*Shepherd*, Serjeant, for the plaintiff, contended that the only question was, whether it was the defendant's object to rid the country of noxious vermin, or whether he hunted for the sake of amusement. If it was merely for amusement, the law does not sanction it. Even in the enjoyment of a man's own property, the maxim of law is, that every man must so use his own, as not to injure his neighbours; if that is the law with respect to

A. D. 1809 the enjoyment of property, then, unquestionably, as to the enjoyment of an amusement, the principle is doubly applicable, and no one can say, that under the pretence of destroying a noxious animal, it is lawful to trespass over every species of property a fox may go through. I should extremely doubt, whether, after starting a fox on one piece of land, persons have a right to follow it on the lands of another, even if they do it for the destruction of the animal. In Pentham v. Gundry, the judgment of the court proceeded upon the plaintiff's admitting, that the way taken by the defendant was the *only* one to destroy the vermin, and therefore the action could not be supported.

Lord *Ellenborough* said, "The defendant states in his plea, that the trespass was not committed for the purpose of the diversion and amusement of the chase merely, but as the only way and means of killing and destroying the fox. Now, if you was to put it upon this question, Which was the principal motive? Can any man of common sense hesitate in saying, that the principal motive and inducement was not the killing of vermin, but the enjoyment of the sport and diversion of the chase? and we cannot make a new law to suit the pleasures and amusements of those gentlemen, who choose to hunt for their diversion. These pleasures are to be taken only when there is the consent of those who are likely to be injured by them, but they must be necessarily subservient to the consent of others. There may be such a public nuisance by a noxious animal, as may justify the running him to his earth, but then you cannot justify the digging for him afterwards, that has been ascertained and settled to be law; but even if an animal may be pursued with dogs, it does not follow that fifty or sixty people have, therefore, a right to follow the dogs, and trespass on other people's lands. I cannot see what it is that is contended for by the defendant. The only case which will at all bear him out,

is that of Fentham v. Gundry; if it be necessary, I should be glad that that case should be fully considered. I have looked into the case in the Year Book, 12 Hen. 8. pl. 9. That seems to be nothing more than the case of a person who had chaced a stag from the forest, into his own land, where he killed it, and on an action of trespass being brought against the forester, who came and took the stag, he justified, that he had made fresh suit after the stag, and it was held that he might state that he was justified, and the plaintiff took nothing by his writ. This is the case upon which that of Fentham v. Gundry is built, but it is founded only on an obiter dictum of Justice *Brooke*, and it does not appear to me to be much relied on; but even in that case, it is emphatically said by the judge, that a man may not hunt for his pleasure or his profit, but only for the good of the common weal, and to destroy such noxious animals as are injurious to the common weal. Therefore, according to this case, the good of the public must be the governing motive. The jury, under his Lordship's direction, found a verdict for the plaintiff. A. D. 1809.

Since printing the prior part of the Work, the following Case has been pointed out (*a*).

At the Stafford Spring Assizes, 1804, in an action for killing game, by coursing, the defendant not being qualified, *Williams*, Serjeant, for the plaintiff, insisted, (and in this he was confirmed by Mr. Justice *Lawrence*,) that though a qualified person may take his servant or servants to assist him to kill game, he cannot qualify them to kill it, neither will his presence protect an unqualified person, not being his servant, who goes for the purpose of taking the amusement of coursing. But if such person take an active part, by beating across the fields or in open

(*a*) 2 Burn's Justice, 21 ed.

A. D. 1809. lands, and join in the diversion in the same manner as a qualified person, he is as much liable to the penalties, as if no such qualified person were present. The learned judge observes, that the contrary was the usual practice, but that practice would not alter the law.

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